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Supreme Court, U.S.
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Docket No. 03-210

In the Supreme Court of the United States

In re Sophia Foley,

On Petition for Writ of Certiorari
to the Court of Appeals of Maryland

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

I. Does the Federal Constitution provide, independent of any state or federal collateral order doctrine, a right to appeal an interlocutory order infringing upon a fundamental liberty interest?

LIST OF PARTIES

Petitioner: **Michael Foley,**
Husband and Health Care Agent of Sophia Foley

Respondent: **Eugenia Berg, Sister of Sophia Foley**

Interested Party: **Sophia Foley**

Note: No corporate disclosure statement is required by S.Ct. Rule 29.6 because all parties are individuals.

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CITATION TO REPORTS OF LOWER OPINIONS

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STATEMENT OF JURISDICTION

Petitioner seeks review of a state trial court's March 20, 2001 interlocutory order and the Court of Appeals of Maryland's April 4, 2003 decision determining that the trial court's order was not subject to appeal. Petitioner sought a rehearing; however his motion for reconsideration was denied by the Court of Appeals of Maryland on May 6, 2003.

This Court has jurisdiction to review the decision of the Court of Appeals of Maryland, pursuant to 28 U.S.C. §1257(a) (Appendix at A38), because Petitioner seeks enforcement of rights protected under the Fourteenth Amendment to the United States Constitution (Appendix at A37).

CITATIONS TO CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN CASE

Petitioner has included (Appendix at A37-A48), the verbatim text of the following statutes involved in this case:

U.S. Const. amend. XIV, §1.

28 U.S.C. § 1257.

Md. Code Ann., Health Gen §§5-601, 5-602, 5-605, 5-616, 5-618 (Maryland Health Care Decisions Act ("HDCA")).

Md. Rule 2-423.

STATEMENT OF THE CASE

I. Factual Background

In 1992, Sophia Foley's ("Mrs. Foley") board-certified neurologist determined that she suffered from dementia, most likely of the Alzheimer's type. Prior to the deterioration of her disease, and while competent, she executed a valid health care power of attorney naming her husband, Petitioner Michael Foley, as her health care agent. Such an appointment of an agent is authorized and contemplated by the Maryland HDCA (*see* Appendix at A38-A47), a statute tailored to satisfy the requirements of this Court's decision in *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

In 1997, one of Mrs. Foley's sisters, Respondent Eugenia Berg, filed her first guardianship action alleging that Mrs. Foley's dementia was caused by Lyme disease. Shortly thereafter, Ms. Berg's first action was properly dismissed, but not before Mr. Foley's agency, and its propriety, were conclusively established by the trial court.

In 2000, Ms. Berg instituted the instant matter by filing her second guardianship action seeking appointment as guardian of Mrs. Foley's person. Ms. Berg sought to wrest control of Mrs. Foley from her husband, undermine Mrs. Foley's health care power of attorney, and render impotent Mr. Foley's health care agency.

Ms. Berg's court filings in the second action, stated that "Mr. Foley . . . has refused to . . . permit Mrs. Foley to be taken to a doctor for the purpose of having Mrs. Foley examined and treated for Lyme disease . . . ." In fact, in 1997 and in accord with Center for Disease Control testing procedures, Mrs. Foley's board-certified physicians determined that Mrs. Foley was not infected with Lyme disease. Undeterred by these results, Ms. Berg sought to be appointed Guardian so that she could have Mrs. Foley "examined and treated for Lyme disease," in a manner contrary to the generally accepted methods of testing for this dreaded disease and contrary to the decision of Mrs. Foley's husband and proper health care agent, Mr. Foley.

It is uncontested that Mrs. Foley is not able to make her own health care decisions. It is also uncontested that her husband is the properly appointed health care agent, pursuant to the HDCA. (*See* relevant sections of the HDCA, Appendix at A38-A47.) Further, it is not contested that Mr. Foley objects, in his role as his wife's properly appointed health care agent, to the administration of additional tests and treatment for Lyme disease. Finally, there has been no allegation, much less substantiation, that Mr. Foley's decision is, in any way, contrary to his wife's wishes.

Apparently unwilling to wait for the trial court to reach the merits of her second guardianship action in due course, Ms. Berg instead sought to have Mrs. Foley tested for Lyme disease by improperly employing a motion for physical examination pursuant to a state discovery rule. (*See* Md. Rule 2-423 at A41.) Ms. Berg's "discovery" motion sought implementation of an "experimental" protocol for diagnosing Lyme disease prescribed by experts hired by Ms. Berg, which is exactly the same relief sought in the case-in-chief, namely, control over Mrs. Foley for the purpose of testing for, and resultant treatment of, Lyme disease.

Mr. Foley, asserting his duty and his responsibility as Mrs. Foley's appointed health care agent, appropriately objected to the motion. Because it is undisputed that Mrs. Foley was "disabled" under Maryland law, an additional examination to establish her disability was unnecessary. Ms. Berg's motion for examination, therefore, did not seek to establish or confirm Mrs. Foley's disability. Instead, it sought to implement a new testing protocol for Lyme disease. Remarkably, the trial court granted the motion, over Mr. Foley's objection, authorizing the Lyme testing and other tests.

Mr. Foley timely appealed the trial court's decision. The Chief Judge of the Court of Special Appeals of Maryland initially determined that an appeal should proceed, under Maryland's collateral order doctrine.[1] Later, the intermediate appellate court expressly found that Maryland's version of the collateral order doctrine allowed appellate review and proceeded to vacate the trial court "discovery" order. (*See* Court of Special Appeals Opinion, Appendix at A26-A31.)

The Maryland Court of Appeals granted Ms. Berg's petition for certiorari, reversed the Court of Special Appeals, and directed that the appeal be dismissed because the trial court's interlocutory "discovery" order was not subject to appeal, under Maryland's collateral order doctrine.

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[1] As should become evident *infra*, Mr. Foley does not seek directly review of Maryland's collateral order doctrine, or its federal counterpart. Although the state's doctrine mirrors the federal version, *see Pittsburgh Corning Corp. v. James*, 353 Md. 657, 661 n.1, 728 A.2d 210, 212 n.1 (1999) (discussing Maryland's prior adoption of federal doctrine), the issue isolated for this Court's review is the federal constitutional right to an appeal when an interlocutory order infringes upon a fundamental liberty interest.

Mr. Foley asked the Court of Appeals of Maryland to reconsider its interpretation and application of the Maryland collateral order doctrine. Mr. Foley focused his motion on the constitutional implications of both the trial court's order and the Court of Appeals of Maryland's decision denying appellate jurisdiction.

Mr. Foley argued that the trial court's "discovery" order, compelling Mrs. Foley to endure the Lyme disease tests over the objection of her health care agent, violated irreparably Mrs. Foley's substantive due process rights in her privacy, self-determination, and bodily integrity liberty interests. Moreover, he argued that his wife's significant right to due process protecting those same liberty interests was violated by the trial court's order permanently and severely infringing upon her fundamental liberty interests. Finally, Mr. Foley argued that the Maryland Court of Appeals, by denying review of the trial court's order permanently and irreparably depriving Mrs. Foley's fundamental liberty interests, directly violated Mrs. Foley's due process rights.

II. S.Ct. Rule 14.1(g) Specification of Stage When Federal Questions First Raised

The various federal constitutional issues raised herein were raised by Mr. Foley at every stage of the instant litigation.

A. Trial Court.

Before the trial court, Mrs. Foleys' constitutional rights were first raised in a motion to dismiss filed by Mr. Foley. Petitioner stated, on page nine of the motion, that any decision disregarding Mrs. Foley's health care agent's

instructions "would completely frustrate Sophia's health care directive, and would be contrary to the spirit and the intent of the Health Care Decisions Act, as well as to *her well-recognized constitutional rights*." (Emphasis added.)

Also, at oral argument concerning Ms. Berg's discovery motion for physical examination, Mr. Foley raised Mrs. Foley's privacy rights, which include her right to self-determination and bodily integrity. Mr. Foley's counsel, at page 28 of the transcript, stated "[t]he second issue . . . cited by Petitioner in both of his [written] filings [indicate that] we really have a constitutional right to privacy here and there has to be more to this than simply somebody thinks that there ought to be a second opinion . . . ."

Moreover, the trial court acknowledged in its opinion that the right, sought to be protected by Mr. Foley, was Mrs. Foley's constitutional right of privacy. (*See* Appendix at A11.)

B. Court of Special Appeals of Maryland.

Before Maryland's intermediate appellate court, Mr. Foley's Brief raised his wife's constitutional right to make medical decisions and cited *Cruzan* and the liberty interests protected therein. Specifically, Mr. Foley argued, at page 29 of his Court of Special Appeals brief, that "[w]e respectfully submit that this Court must reject any attempt to reduce or minimize this right, a right that was recognized by the United States Supreme Court in *Cruzan* . . . ., and a right that was statutorily recognized by the enactment of the . . ." Maryland HCDA.

Furthermore, in his Reply Brief, Mr. Foley asserted that his right to make decisions was based on his wife's constitutionally protected liberty interests. He stated at page

five of the reply brief that "the exercise of one's right to make health care decisions for oneself is based on one's constitutionally protected liberty interests, as described in [*Cruzan*] . . . ."

Finally, the Court of Special Appeals, in its opinion, identified the important liberty interests at issue in the case. (*See* Appendix at A27-A28.)

C. Court of Appeals of Maryland.

Before the Court of Appeals of Maryland, Mr. Foley's Brief asserted his wife's constitutionally protected liberty interests. Mr. Foley argued, on page 21 of his brief, that in *Cruzan:*

> "the Supreme Court removed any doubt that there is a constitutionally protected liberty interest associated with the right to refuse life saving procedures . . . . The *Cruzan* decision . . . mandated the recognition of patient self-determination . . . . The majority . . . [left] it up to the states to decide, among other things, whether to defer to the decisions of a surrogate decision maker."

Finally, in his motion requesting reconsideration, Mr. Foley devoted the entire document to the various violations of the substantive and procedural due process protections of Mrs. Foley's right to privacy, bodily integrity and self-determination. (*See* Motion to Reconsider, set forth in full at Appendix at A48-A65.) The Court's terse denial of the reconsideration request did not mention, or address, the constitutional issues raised by Mr. Foley.

ARGUMENT AMPLIFYING REASONS FOR WRIT

I. Statements of S.Ct. Rule 10 Considerations

A. S.Ct. Rule 10(b).

The Court of Appeals of Maryland's decision (determining that, despite permanent and irreparable deprivation of fundamental liberty interests, an interlocutory order is not subject to immediate appeal) is at odds with other state courts of last resort and federal courts of appeal. *See In re Master Lock*, 528 F.2d 5 (2d Cir. 1975) (where due process rights are irreparably injured, interlocutory appeal will lie); *In re Brittany S.*, 147 N.H. 489, 490, 792 A.2d 384, 385 (2002) (court ignored collateral order doctrine because of federal due process claim asserting fundamental rights of parent); *Pennsylvania v. $9,847.00 U.S. Currency*, 161 Pa. Cmwlth. 548, 557, 637 A.2d 736, 741 (1994), *rev'd on other grounds*, 550 Pa. 192, 704 A.2d 612 (1997) (deciding that when federal constitutional right is permanently denied, that right to immediately appeal exists). *See* S.Ct. Rule 10(b).

B. S.Ct. Rule 10(c).

The instant matter presents an attractive and useful vehicle for this Court to clarify important, yet undecided, questions of federal constitutional law left in the wake of *Sell v. United States*, ___ U.S. ___, 123 S.Ct. 2174, ___ L.Ed.2d ___ (2003)[2]. The Court of Appeals of Maryland, in the instant civil state court matter, has decided an important

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[2] The *Sell* decision was rendered on June 16, 2003. This was after the Court of Appeals of Maryland denied Mr. Foley's Motion for Reconsideration. Thus, *Sell* did not form a basis for Mr. Foley's motion to reconsider or the Court's denial thereof.

federal constitutional issue in a way that, Petitioner argues, conflicts with *Sell* and its predecessors. *See* S.Ct. Rule 10(c). The posture of Mr. Foley's state court case removes from this Court's analysis the questions regarding the proper application of jurisdictional statute or judicial doctrine present in *Sell*. Only federal constitutional considerations, regarding the right to appeal an interlocutory order depriving a fundamental right, remain standing and viable for this Court's review here.

II. Argument

A. Introduction.

The question that remains open, post-*Sell*, is: Does *Sell's* protection of "severe intrusions" upon "important constitutional issues" flow from the federal collateral order doctrine or, in the absence of the federal collateral order doctrine, does the Federal Constitution provide, independently, a right to appeal?

Put another way, it is not clear, from the *Sell* majority and dissenting opinions, the extent to which the collateral order doctrine protects pre-existing constitutional rights. Of course, these constitutional rights exist with or without judicially created doctrines, like the collateral order doctrine. However, *Sell* did not elucidate the extent to which protection of these rights stems from the federal collateral order doctrine or from some inherent constitutional protection operating independently of that doctrine.

In his argument below, Mr. Foley first asserts that Mrs. Foley's fundamental rights are clearly recognized after *Sell*. He then describes the "murky" resolution of federal constitutional protections of those fundamental rights created by the majority and dissenting opinions in *Sell*. Finally, Mr.

Foley frames the proper question for this Court's present analysis: *Does an Independent Constitutional Right Provide for an Interlocutory Appeal Protecting Fundamental Liberty Interests?*

B. Mrs. Foley's Fundamental Interests are Clearly Recognized After Sell.

After *Sell v. United States*, ___ U.S. ___, 123 S.Ct. 2174, 2182, ___ L.Ed.2d ___ (2003), there should be no question that Mrs. Foley has a protected fundamental liberty interest in avoiding involuntary medical testing and treatment. The *Sell* majority determined, without apparent dissent, that a compelled medical intrusion into one's body implicates expectations of privacy and security. *Id.* The *Sell* Court also stated "involuntary medical treatment raises questions of clear constitutional importance". *Id.*

In the courts below, Mr. Foley asserted Mrs. Foley's constitutional right to avoid involuntary medical testing and treatment. In this Petition, however, he does not seek reaffirmation of her fundamental right from this Court. He presumes its existence after *Sell*. Instead, he seeks to have this Court clearly establish his constitutional entitlement, as Mrs. Foley's health care agent, to enforce her rights via an interlocutory appeal.

C. Sell's "Murky" Collateral Order Doctrine and Constitutional Holding.

In *Sell*, this Court recently determined that a criminal defendant was entitled to an appeal of an interlocutory order. In so doing, the *Sell* majority determined that the order satisfied all three prongs of the federal collateral order

doctrine. *See Sell*, 123 S.Ct. at 2182. The controversial aspect of that determination, according to the *Sell* dissenters, was the determination that Dr. Sell satisfied the third and final prong of the doctrine. *See Sell*, 123 S.Ct. at 2187-2191 (Scalia, J dissenting).

The majority determined that "[b]y the time of trial [Dr.] Sell will have undergone forced medication – the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted." *Id.* Thus, this Court opined that Dr. Sell satisfied the third-prong of the collateral order doctrine, namely, that the interlocutory order in the *Sell* case was "effectively unreviewable on appeal from a final judgment". *Id.* The Court determined that appellate jurisdiction existed and went on to consider the merits of Dr. Sell's appeal.

The *Sell* dissent, however, contended that the majority wrongly applied this third-prong. First, the dissenters argued, the majority allegedly failed to consider an oft-stated rule -- that the collateral order doctrine is applied more strictly in criminal cases. *Sell*, 123 S.Ct at 2190. Second, the dissent complained of a "breathtaking expansion" of federal appellate jurisdiction by allowing appeals for any criminal defendant who alleges that, if the trial court's interlocutory order stands, important federal constitutional rights will be forever lost. *Id.*

Specifically, the dissent raised three potential scenarios available, post-*Sell*, to crafty and "opportunistic" criminal defendants. The dissent predicted that:

> "If it is applied faithfully . . ., any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional . . . rights may immediately appeal. He is empowered to hold

> up the trial for months by claiming that review after final judgment "would come too late" to prevent the violation. A trial-court order requiring the defendant to wear an electronic bracelet could be attacked as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the jury could be attacked as an immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial [of] Fifth Amendment rights. All these orders would be immediately appealable [under the majority's decision in this case]." *Sell*, 123 S.Ct at 2190 (Scalia, J. dissenting).

The majority countered Justice Scalia's dissent by briefly claiming:

> "By the time of trial [Dr.] Sell will have undergone forced medication--the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review. These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent." *Sell*, 123 S.Ct at 2190 (internal citations omitted).

The *Sell* majority clearly sought to protect certain constitutional rights from permanent deprivation by a court's

interlocutory order. In light of *Sell*, the federal collateral order doctrine, it would seem, protects "severe intrusions" upon "important constitutional issues." The source of that protection was some combined "murky" effect of the collateral order doctrine, and an independent constitutional protection.

D. Does an Independent Constitutional Right Provide for an Interlocutory Appeal Protecting Fundamental Liberty Interests?

Again, the question that remains open, post-*Sell*, is: Does *Sell's* protection of "severe intrusions" upon "important constitutional issues" flow from the federal collateral order doctrine or, in the absence of the federal collateral order doctrine, does the Federal Constitution provide, independently, a right to appeal? *Sell* did not elucidate the extent to which protection of these rights stems from either source. Of course, state courts need to know this information because they are not subject to the federal collateral order doctrine.

Essentially, Petitioner now asks this Court, in this civil state court matter, to decide (without regard to state or federal jurisdictional statutes or procedures and/or judicially created doctrines) whether there is a federal constitutional right to an appeal, independent of the federal collateral order doctrine, when a fundamental liberty interest is severely and permanently denied by an interlocutory order.

The *Sell* decision is decided on, and clearly intertwined with, the application of a judicially "invented"[3] doctrine, *i.e.*, the collateral order doctrine. Clearly, the *Sell* decision is perched upon the proper application of the federal

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[3] *See Sell*, 124 S.Ct at 2189, n.4 (Scalia, J. dissenting).

version of the doctrine, as well as upon constitutional protection of Dr. Sells's fundamental liberty interests. However, whether the violation of the Federal Constitution or the application of the collateral order doctrine, or both, mandate the appeal is still not entirely clear from *Sell*.

On the other hand, the present matter flows from the application of an almost identical Maryland judicial doctrine, similarly "invented" by state court judges. Thus, removed from this Court's analysis are the questions regarding the proper application of any jurisdictional statute or judicial doctrine present in *Sell* -- only federal constitutional considerations remain standing.

It is Petitioner's position that the Federal collateral order doctrine, and the corresponding Maryland doctrine, each shield (perhaps by happenstance) fundamental liberty interests protected by the Federal Constitution. To be sure, the federal doctrine, in addition to its constitutional heroics, also protects some interests not afforded federal constitutional protection. This Court should now decide the extent to which the constitutional right to appeal immediately an interlocutory, yet permanent, deprivation of fundamental rights exists without regard to the collateral order doctrine. Exposition of these rights will help states, like Maryland, clarify the effect of such federal constitutional rights on their state-specific judicial doctrines. This case provides the perfect vehicle for that clarification.

The *Sell* decision, and its predecessors[4], all turn on the collateral order doctrine and not directly upon the underlying constitutional shelter that the doctrine sometimes

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[4] *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) through *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

provides, intentionally or otherwise, to certain fundamental liberty interests.

The instant matter, originating in state court, insulates this underlying constitutional issue from the collateral effects of jurisdictional statutes and judicial doctrines because it reviews the application of a state's collateral order doctrine under federal constitutional standards. Simply, this Court is not called upon, in the instant matter, to review directly Maryland's collateral order doctrine. In fact, the proper review and analysis of that doctrine rests with the Court of Appeals of Maryland. The only issue that will face this Court is whether application of that state-court doctrine passes federal constitutional muster. Thus, this Court's *Foley* decision will clearly espouse federal constitutional law as it should be applied to all state and federal appeals.

Further, this matter stems from a civil dispute so the Court's analysis need not be clouded by the more stringent collateral order analysis applicable to criminal causes and the resultant consideration of the state's significant interest in the speedy resolution of criminal matters. *See Sell*, 123 S.Ct at 2190 (Scalia, J. dissenting).

By deciding to hear this case, this Court can cleanly address the important constitutional issues underlying the *Sell* collateral order doctrine decision. Thus, the Court can clearly address important questions concerning how federal constitutional rights must, or must not, be protected. The Court can determine when to allow an avenue for appeals asserting severe and permanent deprivation of constitutional rights by interlocutory orders. This, of course, will aid state courts in applying their similar, judicially-invented, doctrines in a constitutionally proper fashion. *See* S.Ct. Rule 10(c). Additionally, the federal courts will benefit from the clarification of the independent constitutional basis for an

appeal pursuant to the federal collateral order doctrine. *See* S.Ct. Rule 10(b).

III. Conclusion

For the reasons set forth above, Petitioner Michael Foley respectfully requests that a writ of certiorari be issued to the Court of Appeals of Maryland and that this matter be reviewed by this Honorable Court or, in the alternative, that this Court vacate the order of the Court of Appeals of Maryland and remand the matter for consideration in light of *Sell*.

Respectfully submitted,

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APPENDIX

S.Ct. Rule 14.1(i)(*i*)
Opinions and Orders Entered in Conjunction with Judgments to be Reviewed

Opinion Of The Court Of Appeals Of Maryland
In re Sophia E. Foley, an Adult.
Court of Appeals of Maryland.
No. 123, Sept. Term, 2001.
April 4, 2003.

"ELDRIDGE, Judge.
The issue in this case is whether the Circuit Court's interlocutory order for a medical examination, under the circumstances here involved, is appealable under the collateral order doctrine. The Court of Special Appeals held that the order was appealable. We disagree.
Sophia E. Foley, a sixty-two year old woman, resides in Annapolis, Maryland, with her husband and seventeen-year-old **589 daughter. In 1988, Sophia's husband, Michael Foley, began noticing that Sophia suffered from lapses in memory and confusion. Sophia's memory loss became progressively worse, and, in 1992, one of her physicians determined that Sophia suffered from dementia, most likely of the Alzheimer's type. Also in 1992, Sophia executed a health care power of attorney designating her husband, Michael, as her health care agent.
In 1997, one of Sophia's sisters, Eugenia Berg, filed in the Circuit Court for Anne Arundel County a guardianship petition, alleging that Sophia's dementia was caused by Lyme disease and that the health care Sophia had been receiving was inadequate because Michael failed or refused to have her

tested for Lyme disease. Shortly thereafter, Michael had Sophia tested for Lyme disease, and the particular tests administered to her indicated that she was not infected by *630 Lyme disease. Subsequently, after a hearing, the Circuit Court dismissed the guardianship petition.

In 2000, Eugenia Berg instituted the present action by filing in the Circuit Court for Anne Arundel County a new guardianship petition, seeking appointment as co-guardian of the person of Sophia. She designated as "interested persons" herself, three other sisters of Sophia, Michael, Sophia's daughter, Sophia's father, and the Director of the Anne Arundel County Department of Social Services. Eugenia alleged that Michael had failed to pay for Sophia's adult day care at the Deerfield Adult Day Care Center, although Eugenia had provided him with money to do so.

Later, Eugenia Berg filed in the guardianship case a motion pursuant to Maryland Rule 2-423 for an examination and testing of Sophia. [FN1] Eugenia asserted that an examination was needed to determine whether Sophia had Lyme disease or other medical conditions that were causing her dementia and for which she was not being treated. Eugenia's position and Michael's response were summarized by the Court of Special Appeals as follows:

FN1. Maryland Rule 2-423 states as follows:

"Rule 2-423. Mental or physical examination of persons.

When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined

and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the examiner, the payment of expenses, and any other relevant matters."

"Eugenia alleged that the Lyme disease tests performed on Sophia in 1997 were not clinically sensitive enough, or were performed too long after exposure, to detect the presence of *Borrelia burgorferi,* the agent that causes Lyme disease.
**631* "Eugenia's motion for physical examination and testing sought to have Sophia retested for Lyme disease under a protocol prescribed by Eugenia's medical experts, Ritchie S. Shoemaker, M.D., and Anthony L. Lionetti, M.D. The testing protocol called for the use of polymerase chain reaction ("PCR") DNA testing and for repeating the Western blot blood tests performed in May 1997. The protocol would require that a series of ten urine specimens and a single blood specimen be taken from Sophia over a ten-week period.
***590* "Michael filed an opposition to the motion for physical examination and testing. Eugenia's motion, Michael's opposition, and supplemental memoranda filed by each were supported by affidavits of their respective expert witnesses. Drs. Shoemaker and Lionetti, and Zdzislaw Fiutowski, M.D., a general practitioner who had examined Sophia in 1994 and 1995, in Michigan, submitted affidavits in support of Eugenia's motion. They opined, in essence, that symptoms of Lyme disease and symptoms of Alzheimer's disease can be similar; that advanced testing techniques such as PCR DNA testing are more effective in diagnosing Lyme disease than are the tests Sophia underwent [in] 1997; and that, if Sophia were found to be infected by the agent that causes Lyme disease, she could be treated for it.
"Dr. Fiutowski did not opine about whether Sophia's

dementia would lessen or improve if she were treated for Lyme disease. Dr. Lionetti addressed that topic in his affidavit, saying only, 'One would hope to see improvement in [Sophia's] neuropsychological status within three months to a year of successful therapy.' He acknowledged, however, that therapy is not always successful, *i.e.*, that it does not always result in the patient no longer being infected with the agent that causes Lyme disease. In his affidavit, Dr. Shoemaker observed: 'What benefit will come to Mrs. Foley if she is tested for Lyme? I have nothing to correct the progressive cerebral atrophy of Mrs. Foley ... Mrs. Foley won't regrow her atrophic brain. Mr. Foley won't have his wife back to care for his daughter.'

**632* "Michael submitted affidavits and/or deposition testimony by Dr. Blum, George C. Samaras, M.D. (another of Sophia's treating doctors), and Andrew R. Pachner, M.D. Dr. Samaras attested not only that Sophia had tested negative for Lyme disease under the CDC protocol administered in 1997 but also that in the 8 years she had been his patient, she never had presented any clinical symptoms of Lyme disease. Dr. Samaras opined that, based on his experience in treating Sophia, she would need to be sedated even to draw a blood sample.

"In Dr. Blum's deposition testimony, from 1997, he opined that Sophia has Alzheimer's disease, that she does not have Lyme disease, that her prognosis is poor, and that Alzheimer's disease only can be definitively diagnosed on autopsy. Dr. Pachner opined that to a reasonable degree of medical certainty, and based on the tests administered in 1997, Sophia does not have Lyme disease and Lyme disease 'can be ruled out as a cause of [her] dementia.' "

The Circuit Court held hearings on the motion for an examination and testing on two different dates, and thereafter the court issued an opinion and an order granting the motion. Michael filed a motion for reconsideration which the Circuit Court denied, and thereafter he filed a notice of appeal. The

Court of Special Appeals, in an unreported opinion, held that the order for an examination was appealable under the collateral order doctrine, held that the Circuit Court had abused its discretion in ordering an examination, and vacated the Circuit Court's order.

Eugenia filed a petition for a writ of certiorari, challenging both the Court of Special Appeals' holding that the order was appealable and the appellate court's holding that the Circuit Court's order represented an abuse of discretion. This Court granted the petition, *In re Sophia Foley*, 368 Md. 239, 792 A.2d 1177 (2002), and, as previously indicated, we shall reverse ***591* on the ground that the order was not appealable. Accordingly, we shall not reach the merits of the controversy.

**633* The parties, as well as the Court of Special Appeals, all agreed that the Circuit Court's order was not appealable as a final judgment in the traditional sense, that the order was entirely interlocutory, and that it was not an appealable interlocutory order under Maryland Code (1974, 2002 Repl.Vol.), § 12-303 of the Courts and Judicial Proceedings Article, designating certain interlocutory orders as immediately appealable. The respondent and the Court of Special Appeals relied solely upon the so-called collateral order doctrine.

The "collateral order doctrine 'treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court.' " *Bunting v. State*, 312 Md. 472, 476, 540 A.2d 805, 807 (1988), quoting *Public Service Comm'n v. Patuxent Valley*, 300 Md. 200, 206, 477 A.2d 759, 762 (1984). The doctrine is a very limited exception to the principle that only final judgments terminating the case in the trial court are appealable, and it has four requirements. As summarized by Judge Wilner for the Court in *Pittsburgh Corning v. James*, 353 Md. 657, 660-661, 728 A.2d 210, 211-212 (1999),

"[w]e have made clear, time and again, as has the United

States Supreme Court, that the collateral order doctrine is a very narrow exception to the general rule that appellate review ordinarily must await the entry of a final judgment disposing of all claims against all parties. It is applicable to a 'small class' of cases in which the interlocutory order sought to be reviewed (1) conclusively determines the disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, *and* (4) would be effectively unreviewable if the appeal had to await the entry of a final judgment. *See* Peat & Co. v. Los Angeles Rams, 284 Md. 86, 92, 394 A.2d 801, 804 (1978); Clark v. Elza, 286 Md. 208, 213, 406 A.2d 922, 925 (1979); Shoemaker v. Smith, 353 Md. 143, 725 A.2d 549 (1999)."

See In re Franklin P., 366 Md. 306, 327, 783 A.2d 673, 686 (2001), where Judge Cathell for the Court recently emphasized: "The four elements of the test are conjunctive in nature **634* and in order for a prejudgment order to be appealable and to fall within this exception to the ordinary operation of the final judgment requirement, each of the four elements must be met." *See also* Jackson v. State, 358 Md. 259, 266-267, 747 A.2d 1199, 1203 (2000).

Furthermore, in Maryland the four requirements of the collateral order doctrine are very strictly applied, and appeals under the doctrine may be entertained only in extraordinary circumstances. Pittsburgh Corning v. James, *supra*, 353 Md. at 666, 728 A.2d at 214; Shoemaker v. Smith, *supra*, 353 Md. at 169, 725 A.2d at 563; Bunting v. State, *supra*, 312 Md. at 482, 540 A.2d at 809. On numerous occasions recently, we have summarily reversed appellate judgments where appeals were entertained under the collateral order doctrine, and we ordered the dismissal of such appeals. *See, e.g.*, Housing Authority v. Smalls, 369 Md. 224, 798 A.2d 579 (2002); Orthodox Jewish Council v. Abramson, 368 Md. 1, 791 A.2d

129 (2002); *Peck v. DiMario,* 362 Md. 660, 766 A.2d 616 (2001); *Bowers v. Callahan,* 359 Md. 395, 754 A.2d 388 (2000); *Dennis v. Folkenberg,* 354 Md. 412, 731 A.2d 883 (1999); *Samuels v. Tschechtelin,* 353 Md. 508, 727 A.2d 929 (1999).

In the case at bar, the order for an examination was a discovery order pursuant to the discovery rules. "This Court **592 has consistently held that discovery orders, being interlocutory in nature, are not ordinarily appealable prior to a final judgment terminating the case in the trial court." *Montgomery Co. v. Stevens,* 337 Md. 471, 477, 654 A.2d 877, 880 (1995), and cases there cited. *See also Goodwich v. Nolan,* 343 Md. 130, 141 n. 8, 680 A.2d 1040, 1045 n. 8 (1996), and cases there cited. As pointed out in *Stevens; Nolan*, and numerous other cases, generally such orders do not meet the requirements of the collateral order doctrine. The Court of Special Appeals held that the discovery order in the present case satisfied the four requirements of the collateral order doctrine, namely that it (1) conclusively determined the disputed question, (2) decided an important issue, *635 (3) resolved an issue that was completely separate from the merits of the action, and (4) would be effectively unreviewable from an appeal from the entry of a final judgment. We question whether the order for a medical examination, simply in an effort to ascertain the actual facts pertinent to the guardianship controversy, met either of the first two requirements of the collateral order doctrine. Assuming *arguendo,* however, that the order did conclusively determine some disputed question and did resolve an important issue, it clearly failed to meet the third and fourth requirements.

The order for an examination was obviously not completely separate from the merits of the controversy. On the contrary, it was a typical discovery order aimed at ascertaining critical facts upon which the outcome of the guardianship controversy might depend. In fact, the Court of Special Appeals implicitly recognized that the examination issue was not separate from the merits, as the appellate court stated that it was "[s]kipping [from the second] to the fourth collateral order doctrine factor." The court's later discussion of the examination order was entirely intertwined with its discussion of who should be the guardian or co-guardians of Sophia.

Turning to the fourth requirement of the collateral order doctrine, the Court of Special Appeals held that the discovery order would be effectively unreviewable on appeal because, "[i]f Michael prevails in the guardianship case but cannot take an interlocutory appeal of this order, Sophia's right [asserted entirely by Michael] to refuse to submit to an examination nevertheless will have been lost." [FN2] The same, however, could be said with regard to *any* order for a mental or physical examination under Rule 2-423. More broadly, it could be said anytime a trial court grants a discovery order. If an objecting defendant is ordered by a trial court to submit **636* to a deposition, or answer interrogatories, or produce documents, or admit certain facts, and if that defendant ultimately prevails when the trial is terminated, the defendant's asserted "right" to resist the discovery on common law, statutory, or constitutional grounds will have been lost.

FN2. The Court of Special Appeals pointed out that, "[t]o be sure, Sophia is not competent to make medical decisions for herself. * * * Michael, as Sophia's health care agent, is

authorized to exercise Sophia's common law right to submit--or not to submit--to medical treatment and testing."

The Court of Special Appeals' reasoning, with respect to the fourth collateral order doctrine requirement, would make any order granting discovery immediately appealable. Nevertheless, we have made it clear that discovery orders are only rarely appealable under the collateral order doctrine. The only circumstance in which we have upheld the appealability of interlocutory discovery orders involves a singular **593 situation far removed from the facts of the instant case. Montgomery Co. v. Stevens, supra, 337 Md. 471, 654 A.2d 877; Public Service Comm'n v. Patuxent Valley, supra, 300 Md. 200, 477 A.2d 759.
This Court has indicated that the fourth requirement of the collateral order doctrine, *i.e.*, that an issue is not effectively reviewable after a final judgment terminating the case, should be deemed satisfied only in
"a very few ... extraordinary situations. Otherwise, ... there would be a proliferation of appeals under the collateral order doctrine. This would be flatly inconsistent with the long-established and sound public policy against piecemeal appeals." Bunting v. State, supra, 312 Md. at 482, 540 A.2d at 809.
See also Pittsburgh Corning v. James, supra, 353 Md. at 666, 728 A.2d at 214; Shoemaker v. Smith, supra, 353 Md. at 169-170, 725 A.2d at 563. The case at bar is not one of those "extraordinary situations."

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO DISMISS THE APPEAL. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE RESPONDENT."

Opinion Of The Circuit Court For Anne Arundel County (Cawood, J.).

"IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

IN THE MATTER OF *

SOPHIA E. FOLEY *

FOR THE APPOINTMENT OF * Case No. C-2000-62914

CO-GUARDIANS OF THE * PERSON

OPINION

This long-running case presents difficult questions concerning Health Care Power of Attorney. We do not detail the entire history of the matter, but a brief restatement is necessary.

Sophia Foley has serious problems which clearly indicate she is incompetent to carry out her normal functions. She appointed her husband, Michael Foley, as her health care agent, with broad powers, specifically mentioning this was despite what her family members may want.

Her sisters, primarily Eugenia Berg, do not argue with the regimen of treatment instituted by Ms. Foley's doctors. They previously moved for a guardianship, which we denied after hearing, in great part because there was absolutely no medical testimony that she was suffering from Lyme's Disease.

Before us at the present time is the Motion for a Medical Examination of Ms. Foley filed by Ms. Berg. While

counsel for Ms. Berg indicates that there is a discovery issue, it is really more than that. The whole gravamen of Ms. Berg's position is that Mr. Foley is not giving his wife the proper tests primarily for Lyme's Disease. While the question of whether Ms. Foley would be willing to follow a Lyme's Disease regimen if it were recommended, or is being replaced as health care guardian remains open. This is one instance where the discovery mechanics is really part of this issue.

Mr. Foley, if, of course, Ms. Foley's spouse. In addition, he has a health care directive as indicated. The purpose of the directive is to permit him to manage her health care, not the state or some other person. Our first question is whether we can interfere with that directive.

In the abstract, the answer is we can. At one extreme, if a health care provider refuses to provide any medication for a person suffering from pneumonia, the state has the right, in one form or the other, to step in. At the other extreme, we have no right to interfere if the health care directive prefers one medication over another, e.g. Cypro or Levaquin as an antibiotic. This Court is not, and should not become, if possible, a physician or physician substitute.

In this case, we are sure that both sides love Ms. Foley and what is best for her. We are also convinced that there are differing medical positions, as expressed in the affidavits and opinions on both sides. We also believe Mr. Foley is trying to follow her doctor's orders as best he can. Where does that leave us?

From Mr. Foley's point of view, it leaves us right where we are. He wishes to take care of his wife as he feels best, and undoubtedly resents her family telling him how to do things in what are difficult times for everyone. One might draw an analogy to the right of privacy which has greatly narrowed in recent Supreme Court cases.

From Ms. Berg's point of view, her sister in bad medical condition which could be ameliorated somewhat by

proper testing and diagnosis. She sees the court as *Parens Patriate* which must protect the right of Sophia Foley to live as normal a life as possible.

From counsel's point of view, Mr. Foley believe that with the conflict in doctors make it is his decision who to follow and he is doing that in good faith. Ms. Berg believes this presents a factual conflict which the court could dismiss out of hand. What worries the court is whether, under the guise of whether a guardianship should supercede the health care directives, we conduct a hearing with the court deciding medical questions concerning Ms. Foley.[1]

From a practical point of view, a hearing involving all the doctors testifying that we should, or should not, be examined for Lyme's disease, under the guise of whether a guardianship is necessary, is counter-productive and terribly expensive experience. Reviewing the tests requested by Ms. Berg, we believe at this point there is enough evidence the tests are desirable, and that they are not seriously invasive, that they ought to be performed. We will order that, in the order presented by Ms. Berg's counsel. The results should be presented to the court so we can see if further action is necessary, after consultation with counsel.

Put another way, we believe there is enough on the record at this point that a reasonable health care agent ought to have the tests performed. We take no position, of course, on what disease she has.

A second and minor issue is whether to make the order in C-1997-37178 final. The cases are consolidated, and we do not believe we should discuss the first case at this time. That does not prevent us from relying upon what is found there.

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[1] Much the same way we are asked at the time to consider whether someone is an appropriate parent because they do, or do not treat ADHD in their children.

JAMES C. CAWOOD, JR., JUDGE"

Order Of The Circuit Court For Anne Arundel County (Cawood, J.).

"IN THE MATTER OF	*	IN THE
SOPHIA E. FOLEY	*	CIRCUIT COURT
FOR THE APPOINTMENT	*	FOR
CO-GUARDIANS OF THE PERSON	*	ANNE ARUNDEL COUNTY
	*	CASE NO.:C-2000-62914 GS

* * * * * * * * *

ORDER

UPON CONSIDERATION of the Motion for Physical Examination of Person, filed by Eugenia Berg, Petitioner, and for good cause shown, and upon notice to the person to be examined and to all parties, and after a hearing on oral arguments, it is this 20th day of May, 2001 by the Circuit Court for Anne Arundel County,

ORDERED, that Mrs. Sophia E. Foley submit to a non-invasive physical examination and testing at Deerfield Senior Services, Adult Day Care Center, 2525 Riva Road, Suite 100, Annapolis, Maryland 21401, on April 10, 2001, at 12:00 noon. The scope of the physical examination will be to identify all of the medical issues involving Mrs. Foley's health care.

The examination and testing are expected to last 1.5 to 2 hours. The examination will be conducted by Ritchie C. Shoemaker, M.D., in consultation with Zdzislaw Fiutowski, M.D.,

and Anthony L. Lionetti, M.D.; and it is further

ORDERED, that the testing of Mrs. Foley consist of the tests listed on the Testing Protocol which is attached as Exhibit 1, is specifically incorporated by reference herein, and is made a part of this Order, and that the testing be conducted under the supervision of Dr. Shoemaker, in consultation with Dr. Fiutowski and Dr. Lionetti; and it is further

ORDERED, that Petitioner provide to Mrs. Foley's husband and health care agent, Mr. Michael Lee Foley, through his attorney, Michael W. Davis, Esq., and to Mrs. Foley's attorney, Carol S. Craig, Esq., and to all interested persons a copy of the written report of Dr. Shoemaker, stating the findings, conclusions, diagnoses, prognoses, plan of treatment, and recommendations of Dr. Shoemaker as a result of the examination and testing and consultation, within three (3) working days after receipt by Petitioner's attorneys of said report; and it is further

ORDERED, that Petitioner pay the expense of the examination and testing, and the professional services of Dr. Shoemaker, Dr. Fiutowski, and Dr. Lionetti, and of the phlebotomist and nurse who assist Dr. Shoemaker at the examination and testing of Mrs. Foley at Deerfield Adult Day Care Center; and it is further

ORDERED, that if Mr. Michael Lee Foley, husband and health care agent of Mrs. Foley, fails to make available Mrs. Foley for the examination and testing ordered herein or fails to provide Petitioner's attorneys with reasonable notice of Mrs. Foley's inability to appear for said examination and testing, resulting in Petitioner's incurring expenses, such expenses shall be paid by Mr. Michael Lee Foley; and it is further

ORDERED, that Petitioner make available Dr. Shoemaker, Dr. Fiutowski, and Dr. Lionetti upon reasonable notice for oral examinations during discovery and for testimony at a trial, if that becomes necessary.

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Judge
JAMES C. CAWOOD, JR.
JUDGE, CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY"

S.Ct. Rule 14.1(i)(*ii*)
Other Relevant Opinions

Opinion of the Court of Special Appeals of Maryland

IN RE: SOPHIA E. FOLEY
UNREPORTED
IN THE COURT OF SPECIAL APPEALS OF MARYLAND
No. 222, September Term, 2001

"On May 4, 2000, Eugenia Berg ("Eugenia"), the appellee, petitioned for appointment of co-guardians of the person of her sister, Sophia E. Foley ("Sophia"), an adult, in the Circuit Court for Anne Arundel County.[2] She then filed in that suit a motion for physical examination of Sophia, under Md. Rule 2-423. The court granted the motion, over the objection of Michael L. Foley ("Michael"), the appellant,

[2] Eugenia petitioned to be appointed co-guardian with one of her sisters, Stephanie Pratowski.

who is Sophia's husband and her appointed health care agent under the Maryland Health Care Decision Act ("HCDA"), Md. Code (1998 Repl. Vol. 2000 Supp.), section 5-601 through 5-616 of the Health General Article ("HG").

Michael noted this interlocutory appeal from the court's order, posing two questions for review, which we have reworded and combined as follows:

> Did the circuit court abuse its discretion in granting Eugenia's motion for physical examination and testing of Sophia, over the objection of Sophia's appointed health care agent?[3]

For the following reasons, we shall vacate the order of the circuit court.

FACTS AND PROCEEDINGS

Sophia is sixty-one years old. She and Michael have been married for 32 year. They have one child Kristina, who is sixteen years old.

On June 25, 1992, Sophia executed a health care power of attorney appointing Michael her health care agent under § 13-601 of the Estates & Trusts Article of the Maryland Code.[4] Under the later-enacted HCDA, a validly

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[3] The questions posed by Michael were:

> I. Does the trial court have the authority to superintend and direct the care of Mrs. Foley, a disabled person who has appointed a health care agent under the Health Care Decisions Act.
> II. Did the trial court exercise in reasonable and sound manner its discretion for good cause shown in accordance with Rule 2-423 in ordering that blood specimens and urine specimens be collected from Mrs. Foley?

[4] At the time Sophia executed the health care power of attorney, § 13-601 of the Estates and Trusts Article ("ET") provided the only statutory mechanism by which a principal could enable an agent to carry out specific directives with respect to the principal's medical treatment, including the withholding or withdrawing of artificially administered

executed health care power of attorney made before October 1, 1993, shall be given effect, "even if not executed in accordance with the terms of th[e] article." HG § 5-616. Section 5-601(b)(a) of the HCDA provides that a health care power of attorney such as the one in this case is an "advance directive," and we shall refer to it as such.

Sophia's advance directive gives Michael the sole power and discretion to make health care decisions for her, in the event she is incompetent to make them herself. Michael is to do so in accordance with Sophia's expressed wishes or, if she did not make her wishes known, in accordance with his assessment of what would be in her best interest. The advance directive names Peter Goldsmith, a family friend, the contingent successor health care agent, in the event Michael is no longer able to perform in that capacity, and further provides that Sophia's wishes should be followed by her health care agent regardless of "any contrary feelings or beliefs of members of her family, friends or guardians."

About four years before she executed her advance directive, Sophia started to experience some short term memory loss that interfered with her ability to perform her job. Sophia's memory deficits progressed over the years. In January of 1992, one of her primary care doctors, Larry W.

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sustenance, under specified circumstances in which the principal was disabled or incompetent. 73 Op. Att'y Gen. 162, 184 (October 17, 1988). In 1993, the General Assembly amended ET § 13-601, among other portions of the Maryland Code, to reflect the passage of the HCDA. Section 13-601(e), in part, now provides:

> (1) This section does not apply to an instrument or portion of an instrument that is an advance directive appointing a health care agent under Title 5, subtitle 6 of the Health-General Article.
> (2) An instrument or portion of an instrument that is an advance directive appointing a health care agent is subject to the provisions of Title 5, Subtitle 6 of the Health-General Article.

ET § 13-601 (e) (1998 Repl. Vol., 2000 Supp.).

Blum, M.D., diagnosed her with dementia, most likely early Alzheimer's disease. In the years thereafter, Sophia's dementia continued to progress. By the time of the events relevant to his case, it was so advanced that she was conscious but completely unable to communicate. It is undisputed that when Sophia executed her advance directive, she was mentally competent, but she has not been mentally competent since the Fall of 1993.

In May 1997, Eugenia filed a guardianship petition in the Circuit Court for Anne Arundel County alleging that Sophia's dementia was caused by Lyme disease and the health care she was receiving under Michael's direction was inadequate, because Michael either was failing or refusing to have her tested for Lyme disease. Soon after the guardianship petition was filed, Michael had Sophia tested for Lyme disease, under the direction of Dr. Blum and pursuant to the testing protocol of the Centers for Disease Control and Prevention ("CDC"). The three tests administered to Sophia under that protocol were: (1) the "ELISA" or "EIA" blood screening test; (2) the IgG Western blot blood test; and (3) the IgM Western blot blood test. The test results showed that Sophia was not infected with active Lyme disease.

In November 1997, the circuit court held an evidentiary hearing on the guardianship petition. Dr. Blum testified, by videotape, about the results of the Lyme disease tests that had been administered to Sophia. He opined that Sophia's dementia was most likely of the Alzheimer's type. At the conclusion of the hearing, the court dismissed the guardianship petition, finding in part that Sophia's advance directive was legally valid and there was no evidence that the health care she was receiving was inadequate. The court concluded that there was no reason to appoint a guardian of the person for Sophia.

About two and a half years later, on May 4, 2000, Eugenia filed a new petition, again seeking appointment as

co-guardian of the person of Sophia. She alleged that Sophia is a person under a disability, under Md. Code (1998 Repl. Vol., 2000 Supp.), section 13-101(e) of the Estates and Trusts Article ("ET"), and identified nine "interested persons," under ET section 13-101(j) – herself, Sophia, Michael, Kristina, three other sisters of Sophia, Sophia's father and the director of the Anne Arundel County Department of Social Services. Finally, Eugenia alleged that Michael had failed to pay for Sophia's adult day care at the Deerfield Adult Day Care Center, even though she (Eugenia) had provided him money for that purpose.[5]

Michael filed an answer to the petition opposing it and raising numerous affirmative defenses.

On November 16, 2000, Eugenia filed a motion for physical examination and testing of Sophia, under Md. Rule 2-423. In support, Eugenia stated that an examination was needed to diagnose whether Sophia has Lyme disease or "other medical conditions" that are causing her dementia and for which she is not being treated. She further stated that because Michael was maintaining that the cause of Sophia's dementia is uncertain, but likely is Alzheimer's disease, while Eugenia was maintaining that the cause of Sophia's dementia needed to be determined, so it could be treated, Sophia's physical and mental conditions were "in controversy." Eugenia added that she "desire[d] independent

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[5] ET section 13-705(c)(2) provides that a petition for guardianship of the person of a disabled person shall include signed and verified certificates of competency from two licensed physicians or one licensed physician and one licensed psychologist who have examined and evaluated the disabled person. Likewise, Md. Rule 10-202 (a)(1) requires that the applicant seeking a guardianship of the person of a disabled person attach to his petition a statement of "the physician's or psychologist's opinion as to: (1) the cause, nature, extent, and probable duration of the disability, (2) whether the person requires institutional care, and (3) whether the person has sufficient mental capacity to understand the nature of and consent to the appointment of a guardian." No such certificates and statement were filed in this case.

verification of [Sophia's] physical and mental conditions." Finally, Eugenia alleged that the Lyme disease tests performed on Sophia in 1997 were not clinically sensitive enough, or were performed too long after exposure, to detect the presence of Borrelia burgorferi, the agent that causes Lyme disease.

Eugenia's motion for physical examination and testing sought to have Sophia retested for Lyme disease under a protocol prescribed by Eugenia's medical experts, Ritchie S. Shoemaker, M.D., and Anthony L. Lionetti, M.D. The testing protocol called for the use of polymerase chain reaction ("PCR") DNA testing and for repeating the Western blot blood tests performed in May 1997. The protocol would require that a series of ten urine specimens and a single blood specimen be taken from Sophia over a ten-week period.

Michael filed an opposition to the motion for physical examination and testing. Eugenia's motion, Michael's opposition, and supplemental memoranda filed by each were supported by affidavits of their respective expert witnesses. Drs. Shoemaker and Lionetti, and Zdzislaw Fiutowski, M.D., a general practitioner who had examined Sophia in 1994 and 1995, in Michigan, submitted affidavits in support of Eugenia's motion. They opined, in essence, that symptoms of Lyme disease and symptoms of Alzheimer's disease can be similar; that advanced testing techniques such as PCR DNA testing are more effective in diagnosing Lyme disease than are the tests Sophia underwent 1997; and that, if Sophia were found to be infected by the agent that causes Lyme disease, she could be treated for it.

Dr. Fiutowski did not opine about whether Sophia's dementia would lessen or improve if she were treated for Lyme disease. Dr. Lionetti addressed that topic in his affidavit, saying only, "One would hope to see improvement in [Sophia's] neuropsychological status within three months to a year of successful therapy." He acknowledged, however, that therapy is not always successful, i.e., that it does not

always result in the patient no longer being infected with the agent that causes Lyme disease. In his affidavit, Dr. Shoemaker observed: "What benefit will come to Mrs. Foley is she is tested for Lyme? I have nothing to correct the progressive cerebral atrophy of Mrs. Foley ... Mrs. Foley won't regrow her atrophic brain. Mr. Foley won't have his wife back to care for his daughter."

Michael submitted affidavits and/or deposition testimony by Dr. Blum, George C. Samaras, M.D. (another of Sophia's treating doctors), and Andrew R. Pachner, M.D. Dr. Samaras attested not only that Sophia had tested negative for Lyme disease under the CDC protocol administered in 1997 but also that in the 8 years she had been his patient, she never had presented any clinical symptoms of Lyme disease. Dr. Samaras opined that, based on his experience in treating Sophia, she would need to be sedated even to draw a blood sample.

In Dr. Blum's deposition testimony, from 1997, he opined that Sophia has Alzheimer's disease, that she does not have Lyme disease, that her prognosis is poor, and that Alzheimer's disease only can be definitively diagnosed on autopsy. Dr. Pachner opined that to a reasonable degree of medical certainty, and based on the tests administered in 1997, Sophia does not have Lyme disease and Lyme disease "can be ruled out as a cause of [her] dementia."

On January 10 and March 14, 2001, the court held a non-evidentiary hearing on the motion for physical examination and testing. Thereafter, on May 20, 2001, it issued a memorandum opinion and order granting the motion. The circuit court commented in its opinion that the issue before it was "more than [a discovery issue]," and the "whole gravamen of [Eugenia's] position is that [Michael] is not giving [Sophia] the proper tests primarily for Lyme's [sic] Disease." The court went on to conclude that the mere fact that Sophia appointed Michael her health care agent, and that Sophia is incompetent, does not mean that the court has no

right to "step in." It appears that the court was not limiting its ruling on this point to whether it could order, as part of the discovery in the guardianship case, that Sophia undergo a mental or physical examination.

The court further commented, "We are also convinced that there are differing medical positions, as expressed in the affidavits and opinions on both sides. We also believe [Michael] is trying to follow [Sophia's] doctor's orders, as best he can. Where does that leave us?" The court's opinion then continues as follows:

> From Mr. Foley's point of view, it leaves us right where we are. He wishes
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> > to take care of his wife as he feels best, and undoubtedly resents her family telling him how to do things in what are difficult times for everyone. One might draw an analogy to the right of privacy which has greatly narrowed in recent Supreme Court cases.
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> > From Ms. Berg's point of view, her sister [is] in bad medical condition which could be ameliorated somewhat by proper testing and diagnosis. She sees the court as *parens Patriate* which must protect the right of Sophia Foley to live as normal a life as possible.
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> > From counsel's point of view, Mr. Foley believe[s] that with the conflict in doctors make it is his decision who to follow and he is doing that in good faith. Ms. Berg believe this presents a factual conflict which the court could dismiss out of hand. What worries the court is whether, under the guise of whether a guardianship should supercede [sic] the health care directives, we conduct a hearing with the court deciding medical questions concerning Ms. Foley.

> From a practical point of view, a hearing involving all the doctors testifying that we should, or should not, be examined for Lyme's [sic] disease, under the guise of whether a guardianship is necessary, is counter-productive and terribly expensive experience. Reviewing the tests requested by Ms. Berg, we believe at this point there is enough evidence the tests are desirable, and that they are not seriously invasive, that they ought to be performed. We will order that, in the order presented by Ms. Berg's counsel. The results should be presented to the court so we can see if further action is necessary, after consultation with counsel.
>
> Put another way, we believe there is enough on the record at this point that a reasonable health care agent ought to have the tests performed. We take no position, of course, on what disease she has.

(Footnote omitted.)

Michael filed a motion for reconsideration, which the court denied on April 2, 2001. He then filed a notice of appeal.

DISCUSSION

As we have explained, the order for physical examination that is being challenged in this appeal was entered by the circuit court in a guardianship of a disabled person proceeding in which it was undisputed that the disabled person -- Sophia -- was and remains incompetent. Guardianship proceedings involving the disabled are governed by ET sections 13-101 through 13-107, ET sections 13-701 through 13-713, and Chapters 100 and 200 of Title 10 of the Maryland Rules. Under ET section 13-704, the circuit court has the authority to "superintend and direct the care of a disabled person, appoint a guardian of the person, and pass orders and decrees respecting the person as seems proper."

The appointment of a guardian "rests solely in the discretion of the equity court and the administering of the office as it pertains to both the person and property of the ward and is subject to judicial control." *Kircherer v. Kircherer,* 285 Md. 114, 119 (1979).

ET section 13-705 establishes the standard for appointing a guardian of the person of a disabled person. It states that a guardian

> shall be appointed if the court determines from clear and convincing evidence that [the disabled] person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addition to drugs, *and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.*

ET § 13-705(b) (emphasis added).

Md. Rule 10-102(b), which pertains to guardianship proceedings, provides that "[a]ny interested person may obtain discovery in a contested matter pursuant to Title 2, Chapter 400 of these Rules, unless otherwise ordered by the court. Except as otherwise provided in this Title, a court may apply any of the rules in Title 2 as appropriate." An "interested person" is defined in Md. Rule 10-103(f) as "the disabled person; the guardian and heirs of that person; a governmental agency paying benefits to that person or a person or agency eligible to serve as guardian of the person under [ET § 13-707]; the Department of Veterans Affairs; … and any other person designated by the court."

Md. Rule 2-423 govern motions for physical and mental examinations in civil cases. It states, in relevant part:

> When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. . . .

The circuit court has broad discretion in ruling upon a motion for physical or mental examination under Md. Rule 2-423. *See Hutzel v. Boyer*, 252 Md. 227, 236 (1969); *Roberts v. Roberts,* 198 Md. 229, 303 (1951); *Wilson v. N.B.S., Inc.,* 130 Md. App. 430, 447-48 (2000). Nevertheless, such a motion only may be granted if the mental or physical condition of the party to be examined (or the person under this legal control or custody) is "in controversy" and only upon a showing of "good cause" for the examination. *See Hutzell v. Boyer, supra,* 252 Md. at 236 ("[t]he right to a mental or physical examination provided for under [this Rule] is a matter to be granted within the sound discretion of the court 'for good cause shown.'").

The standard of review of a circuit court's decision to order a physical or mental examination under Md. Rule 2-423 is whether the court abused its discretion. *North River Insurance Co. v. Mayor & City Council of Baltimore*, 343 Md. 34, 47 (1996) (circuit court rulings on discovery "will be disturbed on appellate review only if there is an abuse of discretion"), *Turner v.* Whisted, 327 Md. 106, 114 (1992); *United Railways & Electric Co. v. Cloman*, 107 Md. 681, 690 (1908) ("the general rule is that [the physical examination of a plaintiff in a personal injury action] cannot be demanded as

a matter of right by a defendant, but the application is addressed to a sound discretion of the trial Court, which will not be interfered with by an appellate Court unless such discretion was manifestly abused").

APPEALABILITY

Before addressing the merits of this appeal, we first must consider whether we have jurisdiction to hear it, given that it is taken from an interlocutory order.

Md. Code (1998 Repl. Vol., 2000 Supp.) section 12-301 of the Courts and Judicial Proceedings Article ("CJ" provides that a party may appeal to this Court from a "final judgment." A final judgment is "a judgment, decree, sentence, order, determination, decision, or other action by a court, including an orphans' court, from which an appeal, application for leave to appeal, or petition for certiorari may be taken." CJ § 12-101(f); *Baltimore City Dept. of Social Services* ("DSS") *v. Stein*, 328 Md. 1, 9 (1992).

It is well established that "the underlying policy of the final judgment rule is that piecemeal appeals are disfavored." *Cant v. Bartlett*, 292 Md. 611, 614 (1982). As this Court has recognized, "it is ultimately for [the Court of Appeals] to decide which judgments or orders are final and therefore appealable under [CJ] section 12-301." *Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 340 (1999) (holding that an order requiring a party to disclose documents in its possession is presently appealable under a final judgment analysis, or in the alternative, as a collateral order) (quoting *Peat, Marwick, Mitchell & Co. v. Los Angeles Ram Football Co.*, 284 Md. 86, 91 (1978)).

Appeals from some interlocutory orders are permitted under CJ § 12-303. In addition, the Court of Appeals has adopted the "collateral order doctrine," as announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), which "treats as final and appealable a limited class of orders which do not terminate litigation in the trial court." *DDS v. Stein, supra*, 328 Md. at 10 (quoting *Public Service Comm'n*

v. Patuxent Valley, 300 Md. 200, 206 (1984)). For an otherwise non-final order to qualify as final and appealable under the collateral order doctrine, "(1) [the order] must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment." *Ashcraft & Gerel v. Shaw, supra,* 126 Md. App. at 341 (quoting *Montgomery County v. Stevens,* 337 Md. 471, 477 (1995)); *see also Town of Chesapeake Beach v. Pessoa Constr. Co., Inc.*, 330 Md. 744, 755 (1993).

Discovery orders such as an order granting a motion for physical or mental examination are interlocutory and thus are not appealable, under the final judgment rule. *Public Service Comm'n v. Patuxent Valley, supra,* 300 Md. at 207; *Sigma Repro. Health Center v. State,* 297 Md. 660, 675 (1983). In addition, discovery orders are not included in the list of interlocutory orders that may be appealed under CJ § 12-303. A discovery order may be appealable, however, under the collateral order doctrine. In our view, the May 20, 2001 order in this case is such an order.

First, the order on its face conclusively determines that Sophia must undergo a physical examination and testing, despite her health care agent's decision that that is not in her best interest.

Second, the issue decided in the order is important. Within the meaning of the collateral order doctrine, an issue is "important" if "the interests that would potentially go unprotected without immediate appellate review . . . are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *Ashcraft & Gerel v. Shaw, supra,* 126 Md. App. at 345 (quoting *In re Ford Motor Co.,* 110 F.3d 954, 959 (3d Cir. 1997)). Thus, this factor requires us to balance the relative interests, "namely, the inconvenience and costs of piecemeal review on

the one hand and the danger of denying justice by delay on the other." *Id.* (internal citations omitted).

The interest involved in this case that potentially would go unprotected if an appeal from the circuit court's May 20, 2001 order were not permitted at this juncture is Sophia's right, under Maryland law, to protect her physical integrity from unwanted intrusion. Maryland recognizes the doctrine of informed consent, which holds that "a competent adult has the right to refuse medical treatment and to withdraw medical treatment once begun." *Wright v. Johns Hopkins Health Systems Corp.*, 353 Md. 568, 572 (1999). "The fountainhead of the doctrine [of informed consent] is the patient's right to exercise control over his own body, . . . by deciding for himself whether or not to submit to the particular therapy." *Mack v. Mack*, 329 Md. 188, 210 (1993) (quoting *Sard v. Hardy*, 281 Md. 432, 439 (1977)). *See also Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990) (suggesting that the right of a competent person to refuse medical treatment is a constitutionally protected liberty interest, although such a right must be balanced against the State's interest in protecting human life).

To be sure, Sophia is not competent to make medical decisions for herself. Her common law right to refuse medical treatment is nevertheless implicated because before she became incompetent, she executed an advance directive appointing a health care agent to make medical decisions for her in the event of her incompetency. Under the HCDA, Michael, as Sophia's health care agent, is authorized to exercise Sophia's common law right to submit – or not to submit – to medical treatment and testing.

Whether the circuit court properly ordered Sophia to submit to medical testing and evaluation, over the objection of her health care agent, is important in this case because it has arisen in the context of a petition for guardianship of a disabled person.

Motions for physical or mental examinations under *Md. Rule* 2-423 most frequently are made, and hence orders are granted, in civil personal injury actions. In those cases, the subject of the order usually is a plaintiff whose physical or mental condition not only is at issue but was placed at issue by his own decision to bring suit. *See Schlagenhauf v. Holder,* 379 U.S. 104, 118 (1969) (in addressing the standard of proof applicable to motions for physical or mental examination under Fed. R. Civ. Proc. 35(a), the Court noted that "a plaintiff in a negligence action who asserts mental or physical injury, . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such an asserted injury."[6]). Likewise, in some civil cases a defendant will raise a defense that puts his physical or mental condition at issue. *See Schlagenhauf v. Holder, supra*, 379 U.S. at 118 (commenting that the "in controversy" and "good cause" standards for an order directing a physical or mental examination under Fed. R. Civ. Proc. 35(a) may be established when a party "asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action."). In those situations, in the final analysis, the subject of the order retains control over his physical integrity. He may choose not to submit to the testing or examination, and instead to

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[5] Fed. R. Civ. Proc. 35(a) provides, in pertinent part:

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

bear the consequences of his action – including the ultimate sanction of dismissal of a claim or of being barred from raising a defense. *See Wilson v. N.B.S., Inc., supra,* 130 Md. App. at 447-48.

When a physical or mental examination is sought in a guardianship of the person case, in contrast, "the proposed ward, the object of the examination, has not voluntarily submitted [his] condition to the court," for determination. *In re Guardianship of Johnson,* 519 N.E.2d 655, 659 (Ohio Ct. App. 1987). Thus, in this case, the proceeding was not brought by Sophia, Michael, or anyone acting for them or on their behalves; and they have no alternative (other than one that would subject Michael to being held in contempt) than to comply with the order, and forfeit the right at issue. In this circumstance, consideration of finality, *i.e.,* avoiding the inconvenience and cost of piecemeal review, are outweighed by the real prospect that delaying review, and thereby subjecting Sophia to a physical examination over the objection of her health care agent and before the propriety of the court's ruling can be addressed, would work an injustice.

Skipping to the fourth collateral order doctrine factor, the right implicated here is time-bound, that is, effectively non-reviewable on appeal from a final judgment. As the trial court itself recognized, Eugenia's motion is not directed to the issue of competency, which is undisputed. Rather, it is primarily directed at obtaining, through discovery, a vehicle by which to make the very medical decisions for Sophia that a) Sophia sought to protect herself from family members other than Michael making; and b) Eugenia would not be in a position to make *unless and until she proved, inter alia,* that Michael was not acting in a manner consistent with Sophia's welfare and safety and that she (Eugenia) is qualified and occupies a statutory priority that would permit the court to allow her to make those decisions. Because there is nothing to prohibit Eugenia from filing repeated guardianship petitions, even if she does not prevail in any of them, she can

obtain by means of a discovery order the same result that she seeks by filing her petitions: to control whether and to what extent Sophia is subjected to medical tests and examinations about potential causes of her dementia. If Michael prevails in the guardianship case but cannot take an interlocutory appeal of this order, Sophia's right to refuse to submit to an examination nevertheless will have been lost.

As noted, the third requirement of the collateral order doctrine is that the order be completely separate from the merits of the action. Again, the issue of competency -- whether Sophia lacks sufficient understanding or capacity to make or communicate responsible decisions about her person -- is not in controversy. The only contested issue, therefore, is whether no less restrictive form of intervention other than the appointment of a guardian of Sophia's person is available, "which is consistent with [her] welfare and safety." ET § 13 705(b). Thus, if Michael's tending to Sophia and making health care decisions on her behalf under the authority conferred on him by the advance directive, being a less restrictive means of intervention than establishing a guardianship, is consistent with Sophia's welfare and safety, the guardianship petition must be denied. For the reasons we shall explain, that issue is capable of being resolved without the necessity of an order for physical or mental examination of Sophia. Accordingly, in this situation, the order is separate from the merits of the action.

ANALYSIS

As we have explained, the circuit court has discretion to grant a motion for physical or mental examination, under Md. Rule 2-423, when the physical or mental condition or characteristic of the person sought to be examined is "in controversy" and the moving party has shown "good cause" for the examination.

In this context, the phrase "in controversy" has been interpreted to mean that the physical or mental condition of the individual sought to be examined is "directly involved in

some material element of the cause of action or defense." *In re Guardianship of Johnson, supra,* 519 N.E. 2d at 659 (quoting *Paul v. Paul,* 366 So. 2d 853, 853 (Fla. Dist. Ct. App. 3d Dist. 1979)).[7] *See also Roberts v. Roberts, supra*, 198 Md. at 303 (holding that the circuit court is vested with discretion to decide whether a party's mental condition is material to the issues in the case). The "good cause" requirement has been interpreted to mean that the physical or mental state of the party, "even though in controversy, could not adequately be evidenced without assistance of expert medical testimony." *In re: Guardianship of Johnson, supra*, 519 N.E.2d at 659; *Paul v. Paul, supra*, 366 So. 2d at 853. In deciding whether "good cause" exists, the court should consider and balance the competing interests of the parties. *See Turner v. Whisted, supra,* 327 Md. at 115-16 (holding that in deciding whether there was "good cause" to order a party to submit to a blood test under Md. Rule 2-423 in a case brought under the legitimation statute at ET § 1-208, the circuit court was to consider, *inter alia*, privacy interests of the parties and the best interest of the child).

We note at the outset that Michael's active engagement as Sophia's appointed health care agent did not diminish or otherwise change the circuit court's authority to

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[7]The Ohio Civ. R. 35(A), which is essentially the same as Md. Rule 2-423 provides:

> Order to examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

order a physical or mental examination of Sophia, under Md. Rule 2-423. To be sure, an analysis of whether a party seeking an order for examination has satisfied the "in controversy" and "good cause" elements of the Rule must take into account the nature of the action and the dispute among the parties. Thus, the nature of this case, as a guardianship of the person proceeding, and the fact that the proposed ward has a duly appointed health care agent who is making the decisions about her health care, were relevant to whether Eugenia had satisfied the "in controversy" and "good cause" elements of the Rule. Yet, that did not mean the circuit court was bound by Michael's health care decisions for Sophia in ruling on the motion. Just as the circuit court can order a competent party to submit to a physical or mental examination, under Md. Rule 2-423, notwithstanding the party's preference to the contrary, the circuit court can order an incompetent party to submit to a physical or mental examination, notwithstanding the party's health care agent's opposition.

As noted, the threshold question for the circuit court to decide in ruling on a Md. Rule 2-423 motion for physical or mental examination is whether a condition or characteristic of the person to be examined is "in controversy" in the case. The answer to that question involves a materiality assessment that depends upon the issues, elements, and disputed facts in the case. Whether a party's condition or characteristic is in controversy is a function of what kind of case has been brought, what issues or elements need to be proven (or disproven), which of those issues or elements are disputed, and the facts, agreed and disputed, that relate to those issues and elements.

The instant case is unlike many guardianship of the person cases in that the parties agree that the person alleged to be disabled lacks sufficient capacity to make or communicate responsible decisions for herself about her person, including about her health care. The affidavits

submitted by the expert witnesses for both Eugenia and Michael respecting the motion for examination reflect that there is no disagreement that Sophia has dementia and that she is unable to make any decisions about her health care, or about anything else. Thus, of the two issues for the circuit court to address in ruling on whether grounds exist for the appointment of a guardian, under ET 13-705(b), one issue is not in dispute.

To revolve the guardianship proceeding therefore, the only disputed issue before the circuit court is whether a less restrictive form of intervention than a guardianship is available to Sophia and is consistent with her welfare and safety. The appointment of a guardian of the person by the court to make decisions about Sophia's health care is a more restrictive means of intervention than is an appointed health care agent who makes those decisions not under the supervision of the court, but under the authority granted under an advance directive; that is especially true when the appointed health care agent is the incompetent person's spouse. Thus, put another way, the ultimate issue before the circuit court in this case is whether in functioning as Sophia's health care agent Michael has taken actions that have been inconsistent with her welfare and safety. For Sophia's physical condition to be "in controversy, "within the meaning of Md. Rule 2-423, her condition must be directly material to that issue.

When the circuit court ruled on the motion for physical examination, the undisputed facts before it established the following. In 1997, the doctors who have been treating Sophia from the time she began to experience dementia, tested her for Lyme disease, using a CDC testing protocol. The test results showed that Sophia was not infected with the agent that causes that disease. Based on those test results and their clinical assessments of Sophia over the years in which they had been treating her, those doctors formed the medical opinion that Sophia does not

have Lyme disease. They also formed the medical opinion that her dementia is in all likelihood Alzheimer's disease. Sophia's doctors have made treatment recommendations based on their medical opinion that she has Alzheimer's disease. Michael has followed the treatment recommendations made for Sophia by her doctors in making decisions about the care Sophia should receive. Indeed, the trial court found as much when it remarked: "We also believe Mr. Foley is trying to follow [Sophia's] doctor's orders as best he can."

Under those circumstances, which are undisputed, it was irrelevant to ruling on the motion for physical examination of Sophia that Eugenia produced experts of her own who believe the CDC protocol for testing Sophia for Lyme disease is deficient and advocate testing Sophia for Lyme disease under another protocol. The fact that there are experts who say they would take a different treatment approach if they -- instead of Drs. Blum and Samaras -- were caring for Sophia had no bearing on the single, critical, issue in this case: whether Michael had been acting contrary to Sophia's welfare and safety, so that a more restrictive means of intervention, *i.e.*, a guardianship, was necessary to address her needs.

Eugenia presented no evidence to show that Sophia's treating doctors are unqualified to be caring for her, that Michael had any reason to believe that they are not so qualified, or that he had any reason not to follow their treatment advice. Thus, even if the testing recommended by Eugenia's experts were performed and were to produce evidence that Sophia is infected by Lyme disease, that evidence would not be probative of whether Michael acted contrary to Sophia's welfare and safety in following a treatment regimen recommended by her treating doctors. Accordingly, when properly assessed in context, Sophia's physical condition was not in controversy, under Md. Rule 2-

423, and the motion for physical examination should have been denied on that basis.

For the same reasons, there was not -- and could not have been -- "good cause" for the requested examination and testing. The evidence that might be generated by the proposed examination and testing not only would not be necessary to a decision on the ultimate issue in the case, it would not be probative of it.

The circuit court did not consider either the issues of "in controversy" or "good cause" when it ruled on the motion for physical examination. Instead, the court decided the motion by assessing whether a reasonable health care agent ought to have Sophia tested using the protocol recommended by Eugenia's experts. As we have explained, that was not the proper standard by which to rule on the motion.

We shall vacate the circuit court's May 20, 2001 order for physical examination and remand the case to the circuit court for further proceedings not inconsistent with this opinion. In so doing, we note that notwithstanding the court's decision in 1997, that Eugenia was an "interested person" for purposes of bringing that guardianship of the person action, that determination did not decide that issue for all time. A person filing a guardianship petition must qualify as an interested person when the petition was filed, under Md. Rule 10-201(a); and under Md. Rule 10-102(b), discovery in a guardianship of the person case only may be obtained by an interested person. In this case, there has never been a determination that Eugenia is an interested person, and her status as an interested person *vel non* is questionable. The circuit court should address that issue as a threshold matter on remand.

ORDER VACATED. COSTS TO BE PAID BY THE APPELLEE."

S.Ct. Rule 14.1(i)(*iii*)

Order on Rehearing or Reconsideration

Court of Appeals of Maryland's
Order Denying Motion to Reconsider

"IN RE: SOPHIA E. FOLEY * In the
* Court of Appeals
* o f Maryland
* No 123
* September Term, 2001

ORDER

The Court having considered the Respondent's Motion to Reconsider filed by Michael L. Foley and the Motion to Reconsider filed by Court-Appointed Counsel, Carol S. Craig, in the above-captioned case, it is this 6th day of May, 2003,

ORDERED, by the Court of Appeals of Maryland, that the motions be, and they are hereby, DENIED.

/s/ Robert M. Bell
Chief Judge

S.Ct. Rule 14.1(i)(*iv*)
Verbatim Constitutional Provisions, Treaties, Statutes, Ordinances, And Regulations Involved In Case

U.S. Const. amend. XIV, §1.

"AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

* * *

"**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1257.

"State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals."

Md. Code Ann., Health Gen. § 5-601.

"Definitions

(a) In this subtitle the following words have the meanings

indicated.
(b) "Advance directive" means:
(1) A witnessed written document, voluntarily executed by the declarant in accordance with the requirements of this subtitle; or
(2) A witnessed oral statement, made by the declarant in accordance with the provisions of this subtitle.
(c) "Agent" means an adult appointed by the declarant under an advance directive made in accordance with the provisions of this subtitle to make health care decisions for the declarant.
(d) "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient.
(e) "Best interest" means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment, taking into account:
(1) The effect of the treatment on the physical, emotional, and cognitive functions of the individual;
(2) The degree of physical pain or discomfort caused to the individual by the treatment, or the withholding or withdrawal of the treatment;
(3) The degree to which the individual's medical condition, the treatment, or the withholding or withdrawal of treatment result in a severe and continuing impairment of the dignity of the individual by subjecting the individual to a condition of extreme humiliation and dependency;
(4) The effect of the treatment on the life expectancy of the individual;
(5) The prognosis of the individual for recovery, with and without the treatment;
(6) The risks, side effects, and benefits of the treatment or the withholding or withdrawal of the treatment; and
(7) The religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest.

(f) "Competent individual" means a person who is at least 18 years of age or who under § 20-102(a) of this article has the same capacity as an adult to consent to medical treatment and who has not been determined to be incapable of making an informed decision.
(g) "Declarant" means a competent individual who makes an advance directive while capable of making and communicating an informed decision.
(h) "Emergency medical services 'do not resuscitate order' " means a physician's written order in a form established by protocol issued by the Maryland Institute for Emergency Medical Services in conjunction with the State Board of Physicians which, in the event of a cardiac or respiratory arrest of a particular patient, authorizes certified or licensed emergency medical services personnel to withhold or withdraw cardiopulmonary resuscitation including cardiac compression, endotracheal intubation, other advanced airway management techniques, artificial ventilation, defibrillation, and other related life- sustaining procedures.
(i) "End-stage condition" means an advanced, progressive, irreversible condition caused by injury, disease, or illness:
(1) That has caused severe and permanent deterioration indicated by incompetency and complete physical dependency; and
(2) For which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective.
(j) "Health care practitioner" means:
(1) An individual licensed or certified under the Health Occupations Article or § 13-516 of the Education Article to provide health care; or
(2) The administrator of a hospital or a person designated by the administrator in accordance with hospital policy.
(k)(1) "Health care provider" means a health care practitioner or a facility that provides health care to individuals.
(2) "Health care provider" includes agents or employees of a

health care practitioner or a facility that provides health care to individuals.
(l)(1) "Incapable of making an informed decision" means the inability of an adult patient to make an informed decision about the provision, withholding, or withdrawal of a specific medical treatment or course of treatment because the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or is unable to communicate a decision.
(2) For the purposes of this subtitle, a competent individual who is able to communicate by means other than speech may not be considered incapable of making an informed decision.
(m)(1) "Life-sustaining procedure" means any medical procedure, treatment, or intervention that:
(i) Utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function; and
(ii) Is of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition, persistent vegetative state, or end-stage condition.
(2) "Life-sustaining procedure" includes artificially administered hydration and nutrition, and cardiopulmonary resuscitation.
(n) "Medically ineffective treatment" means that, to a reasonable degree of medical certainty, a medical procedure will not:
(1) Prevent or reduce the deterioration of the health of an individual; or
(2) Prevent the impending death of an individual.
(o) "Persistent vegetative state" means a condition caused by injury, disease, or illness:
(1) In which a patient has suffered a loss of consciousness, exhibiting no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflex activity of muscles and nerves for low level

conditioned response; and
(2) From which, after the passage of a medically appropriate period of time, it can be determined, to a reasonable degree of medical certainty, that there can be no recovery.
(p) "Physician" means a person licensed to practice medicine in the State or in the jurisdiction where the treatment is to be rendered or withheld.
(q) "Terminal condition" means an incurable condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery."

Md. Code Ann., Health Gen. § 5-602.

"Advanced directive

(a) Any competent individual may, at any time, make a written advance directive regarding the provision of health care to that individual, or the withholding or withdrawal of health care from that individual.
(b)(1) Any competent individual may, at any time, make a written advance directive appointing an agent to make health care decisions for the individual under the circumstances stated in the advance directive.
(2) An owner, operator, or employee of a health care facility from which the declarant is receiving health care may not serve as a health care agent unless the person would qualify as a surrogate decision maker under § 5-605(a) of this subtitle.
(3) An agent appointed under this subtitle has decision making priority over any individuals otherwise authorized under this subtitle to make health care decisions for a declarant.
(c)(1) A written advance directive shall be dated, signed by

or at the express direction of the declarant, and subscribed by two witnesses.
(2)(i) Except as provided in items (ii) and (iii) of this paragraph, any competent individual may serve as a witness to an advance directive, including an employee of a health care facility or physician caring for the declarant if acting in good faith.
(ii) The health care agent of the declarant may not serve as a witness.
(iii) At least one of the witnesses must be an individual who is not knowingly entitled to any portion of the estate of the declarant or knowingly entitled to any financial benefit by reason of the death of the declarant.
(d)(1) Any competent individual may make an oral advance directive to authorize the providing, withholding, or withdrawing of any life-sustaining procedure or to appoint an agent to make health care decisions for the individual.
(2) An oral advance directive shall have the same effect as a written advance directive if made in the presence of the attending physician and one witness and if the substance of the oral advance directive is documented as part of the individual's medical record. The documentation shall be dated and signed by the attending physician and the witness.
(e)(1) Unless otherwise provided in the document, an advance directive shall become effective when the declarant's attending physician and a second physician certify in writing that the patient is incapable of making an informed decision.
(2) If a patient is unconscious, or unable to communicate by any means, the certification of a second physician is not required under paragraph (1) of this subsection.
(f)(1) It shall be the responsibility of the declarant to notify the attending physician that an advance directive has been made. In the event the declarant becomes comatose, incompetent, or otherwise incapable of communication, any other person may notify the physician of the existence of an advance directive.

(2) An attending physician who is notified of the existence of the advance directive shall promptly:
(i) If the advance directive is written, make the advance directive or a copy of the advance directive a part of the declarant's medical records; or
(ii) If the advance directive is oral, make the substance of the advance directive, including the date the advance directive was made and the name of the attending physician, a part of the declarant's medical records.
(g) It shall be the responsibility of the declarant to notify a health care agent that the agent has been named in an advance directive to act on the declarant's behalf.
(h) Unless otherwise provided in the patient's advance directive, a patient's agent shall act in accordance with the provisions of § 5-605(c) of this subtitle.
(i) The absence of an advance directive creates no presumption as to the patient's intent to consent to or refuse life-sustaining procedures."

Md. Code Ann., Health Gen. § 5-605.

"Authorization of surrogate

(a)(1) In this subsection, "unavailable" means:
(i) After reasonable inquiry, a health care provider is unaware of the existence of a surrogate decision maker;
(ii) After reasonable inquiry, a health care provider cannot ascertain the whereabouts of a surrogate decision maker;
(iii) A surrogate decision maker has not responded in a timely manner, taking into account the health care needs of the individual, to a written or oral message from a health care provider;
(iv) A surrogate decision maker is incapacitated; or
(v) A surrogate decision maker is unwilling to make decisions concerning health care for the individual.

(2) The following individuals or groups, in the specified order of priority, may make decisions about health care for a person who has been certified to be incapable of making an informed decision and who has not appointed a health care agent in accordance with this subtitle. Individuals in a particular class may be consulted to make a decision only if all individuals in the next higher class are unavailable:
(i) A guardian for the patient, if one has been appointed;
(ii) The patient's spouse;
(iii) An adult child of the patient;
(iv) A parent of the patient;
(v) An adult brother or sister of the patient; or
(vi) A friend or other relative of the patient who meets the requirements of paragraph (3) of this subsection.
(3) A friend or other relative may make decisions about health care for a patient under paragraph (2) of this subsection if the person:
(i) Is a competent individual; and
(ii) Presents an affidavit to the attending physician stating:
1. That the person is a relative or close friend of the patient; and
2. Specific facts and circumstances demonstrating that the person has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs.
(4) The attending physician shall include the affidavit presented under paragraph (3) of this subsection in the patient's medical record.
(b)(1) If persons with equal decision making priority under subsection (a) of this section disagree about a health care decision, and a person who is incapable of making an informed decision is receiving care in a hospital or related institution, the attending physician or an individual specified in subsection (a) of this section shall refer the case to the institution's patient care advisory committee, and may act in accordance with the recommendation of the committee or

transfer the patient in accordance with the provisions of § 5-613 of this subtitle. A physician who acts in accordance with the recommendation of the committee is not subject to liability for any claim based on lack of consent or authorization for the action.

(2) If a person who is incapable of making an informed decision is not in a hospital or related institution, a physician may not withhold or withdraw life-sustaining procedures if there is not agreement among all the persons in the same class.

(c)(1) Any person authorized to make health care decisions for another under this section shall base those decisions on the wishes of the patient and, if the wishes of the patient are unknown or unclear, on the patient's best interest.

(2) In determining the wishes of the patient, a surrogate shall consider the patient's:

(i) Current diagnosis and prognosis with and without the treatment at issue;

(ii) Expressed preferences regarding the provision of, or the withholding or withdrawal of, the specific treatment at issue or of similar treatments;

(iii) Relevant religious and moral beliefs and personal values;

(iv) Behavior, attitudes, and past conduct with respect to the treatment at issue and medical treatment generally;

(v) Reactions to the provision of, or the withholding or withdrawal of, a similar treatment for another individual; and

(vi) Expressed concerns about the effect on the family or intimate friends of the patient if a treatment were provided, withheld, or withdrawn.

(3) The decision of a surrogate regarding whether life-sustaining procedures should be provided, withheld, or withdrawn shall not be based, in whole or in part, on either a patient's preexisting, long-term mental or physical disability, or a patient's economic disadvantage.

(4) A surrogate shall inform the patient, to the extent possible, of the proposed procedure and the fact that someone

else is authorized to make a decision regarding that procedure.
(d) A surrogate may not authorize:
(1) Sterilization; or
(2) Treatment for a mental disorder."

Md. Code Ann., Health Gen § 5-616.

"Nonimpairment of existing rights

(a) The provisions of this subtitle are cumulative with existing law regarding an individual's right to consent or refuse to consent to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor or incompetent patient, or a patient's family may have in regard to the provision, withholding, or withdrawal of life- sustaining procedures under the common law or statutes of the State.
(b) A valid living will or durable power of attorney for health care made prior to October 1, 1993 shall be given effect as provided in this article, even if not executed in accordance with the terms of this article."

Md. Code Ann., Health Gen § 5-618.

"Short title

The provisions of this subtitle shall be known and may be cited as the 'Health Care Decisions Act'."

Md Rule 2-423.

"MENTAL OR PHYSICAL EXAMINATION OF PERSONS

When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the examiner, the payment of expenses, and any other relevant matters."

S.Ct. Rule 14.1(i)(*iv*)
Record Citations Required by S.Ct. Rule 14.1(g)(*i*)

Mr. Foley's Motion to Reconsider to Court of Appeals of Maryland

RESPONDENT'S MOTION TO RECONSIDER

Pursuant to Md. Rule 8-605, Respondent, Michael L. Foley, requests that this Court reconsider, on Federal and State due process grounds, its April 4, 2003 order and opinion ("Opinion"), a copy of which is attached hereto as ***Exhibit "1"***.

PRELIMINARY STATEMENT

This Court's Opinion determined that the trial court's "discovery" opinion and order[8] (*see* E416-E422)[9], that required Mr. Foley's wife, Sophia E. Foley, to endure additional Lyme disease tests against the wishes of her appointed Health Care Agent, was not a collateral order subject to appellate review. Mr. Foley asserts herein that this Court misapplied the collateral order doctrine. More importantly, however, the trial court's order and this Court's failure to allow an appeal were illegal infringements upon Mrs. Foley's federal and state constitutional rights, as properly asserted by Mr. Foley.[10]

Specifically, Mrs. Foley has a *substantive* due process right to her important liberty interest in self-determination of health care. That right will be violated if the trial court's order stands. Moreover, this Court's denial of a right to appeal the trial court's "discovery" order, on the facts presented in this case, violates Mrs. Foley's right to *procedural* due process protecting her liberty interest. Clearly, any "discovery" order that infringes on a constitutional liberty interest must be appealable. This is so,

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[8] Mr. Foley maintains that the trial court's order amounted to more than a mere discovery order and, instead, made a final resolution of Mrs. Foley's right to self-determination.

[9] References to the record extract before the Court of Special Appeals shall be cited with the letter "E" followed by the page number. All cited pages of the extract are attached hereto collectively as ***Exhibit "2"***.

[10] Although Mr. Foley has sought to shield his wife's constitutionally protected liberty interests throughout this matter, this Court's decision to deny his right to appeal has exacerbated the crisis. Clearly, Mr. Foley's briefing and arguments, before this Court and below, focused on the merits of the case. This Court's remarkable finding that Mr. Foley lacked a right of appeal has precipitated the arguments contained herein and has set the stage for review of the constitutional implications of this Court's Opinion and its application to the facts.

whether the discovery order infringes upon the Fifth Amendment right against self-incrimination or, as in this case, the established liberty interest in self-determination.

Furthermore, from a public policy perspective, the Court's Opinion leaves doubtful the efficacy of the provisions of the Health Care Decisions Act (the "Act"), codified at Md. Code Ann., Health-Gen. ("HG") §5-601, *et seq.*, and undermines the certainty of self-determination clearly intended by the General Assembly. The Opinion, in its current rendition, now holds that a person's health care wishes can be overcome merely by an unappealable "discovery" order. Thus, the whole purpose of the Act, and the clear intent of the General Assembly, may be frustrated by the whim of an unrestrained trial judge, if the right to appeal is abridged.

SCOPE OF MOTION TO RECONSIDER

In its Opinion, this Court determined that the trial court's order did not satisfy the so-called "collateral order doctrine" and was not subject to appellate review. Mr. Foley disagrees with this Court's interpretation and application of the collateral order doctrine and would like this Court to reconsider directly that interpretation and application.[11] However, Mr. Foley, in this motion, will focus on the constitutional implications of both the trial court's order and this Court's erroneous Opinion.

Simply put, Mr. Foley argues here that the trial court's "discovery" order, compelling Mrs. Foley to endure the Lyme disease tests over the objection of her Health Care Agent and *without the right of appeal,* violates irreparably Mrs. Foley's substantive due process rights in her self-

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[11] Obviously, Mr. Foley would welcome and applaud this Court's decision to review and alter its collateral order doctrine interpretation and application, as set forth in the Opinion. Knowing that this Court is unlikely to reconsider its Opinion on that basis, Mr. Foley instead alerts this Court to the constitutional implications of its Opinion given the facts presented in this case.

determination liberty interest. Moreover, her significant right to procedural due process protecting her self-determination liberty interest has been violated by the trial court's order and this Court's Opinion.

LIMITED[12] FACTS RELEVANT TO THIS MOTION

In 1992, Mrs. Foley's physician determined that she suffered from dementia, most likely of the Alzheimer's type. (*See* Opinion at 2.) Prior to the deterioration of her disease, and while competent, she executed a valid health care power of attorney naming her husband, Michael, as her health care agent. (*See* Opinion at 2.) Thereafter, in 1997, one of Mrs. Foley's sisters, Eugenia Berg, filed her first guardianship petition, alleging that Mrs. Foley's dementia was caused by Lyme disease. (*See* Opinion at 2.) Shortly thereafter, Mr. Foley had his wife tested for Lyme disease, the tests indicated that she was not infected, and the petition was properly, and finally, dismissed. (*See* Opinion at 2.)

In 2000, Ms. Berg instituted the instant matter by filing her second guardianship petition (the "Petition") seeking appointment as Mrs. Foley's guardian. (*See* Opinion at 2; E001.) In the Petition, Ms. Berg sought to wrest control of Mrs. Foley from Mr. Foley, undermine Mrs. Foley's health care power of attorney, and render impotent Mr. Foley's health care agency. (*See* E008.) Ms. Berg clearly stated, in her Petition, that "Mr. Foley . . . has refused to . . . permit Mrs. Foley to be taken to a doctor for the purpose of having Mrs. Foley examined and treated for Lyme disease . . . ." (*See* E004.) It is clear, from the quoted text of the Petition, that Ms. Berg sought to be appointed Guardian so that she could have Mrs. Foley "examined and treated for Lyme disease" contrary to the decision of Mrs. Foley's proper

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[12] Only those facts relevant to the disposition of this motion are set forth here. When citing to the Opinion, Mr. Foley refers to the facts as gleaned by this Court and does not concur that events occurred exactly as represented in the Opinion.

Health Care Agent, Mr. Foley. It is important for this Court to note that, at no time, either in the original Petition for Guardianship or in any subsequent pleading or affidavit, has Ms. Berg alleged that Mr. Foley was not following his wife's wishes in making health care decisions, as required by the Act.

Ms. Berg and her counsel have never concealed that they filed the Petition in order to have Mrs. Foley endure certain tests for Lyme disease. (*See* E004 (Petition requests "medical examination" and "treatment . . . for Lyme disease"); E006 (Petition seeks examination and treatment); E346 at 20 – E347 at 11 (Petition filed for "second look" at diagnosis).) The trial court agreed that the entire crux of Ms. Berg's Petition was another attempt to diagnose Lyme disease. (*See* E181 (Petition regards re-diagnosis).)

It is uncontested that Mrs. Foley is not able to make her own health care decisions. (*See* E005 (Petition); E184 (Answer to Petition).) It is also uncontested that Mr. Foley is the properly appointed Health Care Agent, pursuant to the Act. (*See* Opinion at 2.) Further, it is not contested that Mr. Foley objects, in his role as Health Care Agent, to the administration of additional tests for Lyme disease. Finally, there has been no allegation that Mr. Foley's decision is, in any way, contrary to his wife's wishes. Thus, it should be clear that the Petition sought to test for Lyme disease, to control Mrs. Foley's care, and to override Mrs. Foley's right to self-determination and Mr. Foley's legitimate health care agency.

Apparently unwilling to wait for the trial court to reach the merits of the Petition in due course, Ms. Berg instead sought to have Mrs. Foley tested for Lyme disease by improperly employing a motion for physical examination pursuant to a discovery rule. *See* Md. Rule 2-423. Ms. Berg's "discovery" motion sought implementation of a protocol for diagnosing Lyme disease prescribed by so-called "experts" hired by Ms. Berg. (*See* Opinion at 3.) The

"discovery" motion sought exactly the same relief sought in the Petition, namely, control over Mrs. Foley for the purpose of testing for, and treatment of, Lyme disease, among other things. Mr. Foley, asserting his duty and responsibility as Mrs. Foley's appointed Health Care Agent, appropriately objected to the motion. In a ruling, remarkable for its absurdity[13], the trial court granted the motion.

Of course, Mr. Foley appealed the trial court's decision[14]. Chief Judge Murphy initially determined that an appeal should proceed, under the collateral order doctrine. Later, the Court of Special Appeals found, in its opinion, that the collateral order doctrine allowed appellate review. This Court granted a petition for certiorari and, in its Opinion, reversed the Court of Special Appeals and directed that the appeal be dismissed, holding that the trial court's "discovery" order was not subject to appeal.[15]

Finally, as this Motion is reviewed, it should be noted that the Court's Opinion was apparently based on the erroneous assumption that the Lyme testing, contemplated

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[13] The absurdity of the ruling becomes painfully evident after reviewing other plausible situations in which the use of discovery rules, to obtain the exact same relief sought in the case-in-chief, would be plainly absurd. Such examples are discussed briefly in section III(B)(3) of this Motion. (*See infra* at 13.)

[14] Mr. Foley can only presume that the "pragmatic" trial court sought to "resolve" the dispute over the Lyme disease, once and for all, by succumbing to Ms. Berg's "discovery" motion. In the Court's mind, the tests may have provided a quick and reasonable resolution to the controversy. However, Mr. Foley, as his wife's agent, resisted and exercised her liberty interest in self-determination.

[15] It is quite interesting to note that, had the trial court granted Ms. Berg's Petition and ordered Ms. Berg to have Mrs. Foley tested for Lyme disease, that order would have been appealable. However, since the order for the Lyme tests resulted from a "discovery" motion, this Court held that no appeal lies.

under the trial court's order, was required to satisfy the requisite determination in a guardianship proceeding that Sophia E. Foley is disabled. (*See* Opinion at 7, 8.) Since the trial court had already finally determined in 1997 that Mrs. Foley was disabled (*see* E051 at 5 – E051 at 9), and since that finding of fact has never been challenged by any party to this case, there is no need for additional medical testing. Instead, Ms. Berg used the discovery process to circumvent the guardianship process and asked the trial court to grant, via discovery motion, what was being requested in the guardianship petition.

ARGUMENT

I. State and Federal Constitutions Protect Substantive And Procedural Due Process, Especially When Liberty Interests Are Affected.

The due process clauses in the Fourteenth Amendment to the United States Constitution and in Article 24 of the Maryland Declaration of Rights[16] protect an individual's interests in substantive and procedural due process. *See People's Counsel v. Maryland Pub. Serv. Comm'n,* 355 Md. 1, 25-27 (1999) (discussing substantive due process); *Roberts v. Total Health Care, Inc.,* 349 Md. 499, 508-09 (1998) (discussing procedural due process); *see also Pitsenberger v. Pitsenberger,* 287 Md. 20, 27 (1980). In general, there are four classes of due process actions: "(1) a procedural due process claim premised on the deprivation of a property interest; (2) a procedural due process claim premised on the deprivation of a liberty interest; (3) a substantive due process claim premised on the deprivation of

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[16] Many provisions of the Maryland Constitution, such as Article 24 of the Declaration of Rights have counterparts in the United States Constitution. Article 24 is *in pari materia* with its federal counterpart, is the equivalent of the federal provision, and should be interpreted in the same manner. *See, e.g., Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 621 (2002).

a property interest; and (4) a substantive due process claim premised on the deprivation of a liberty interest." *Samuels v. Tschechtelin,* 135 Md. App. 483, 523 (2000).

Therefore, when a liberty interest is in jeopardy, a litigant may seek to protect it by asserting both procedural and substantive due process rights. In this motion, Mr. Foley first argues a *substantive* due process claim premised on deprivation of a liberty interest. He then argues a *procedural* due process claim based upon deprivation of that same liberty interest.

II. Mr. Foley May Assert Mrs. Foley's Fundamental Liberty Interest In Self- Determination Of Her Care, Including Determination Of Medical Testing.

A. Mrs. Foley Has A Fundamental Liberty Interest In Self-Determination Of Her Medical Future.

There is no doubt that the right Mr. Foley seeks to protect is Mrs. Foley's *fundamental* liberty interest in self-determination. All persons have broad rights to bodily integrity. *Baer v. Baer,* 128 Md. App. 469, 480 (1999) (citing *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 271, 110 S.Ct. 2841, 2847 (1990)). A person's right to resist medical intervention implicates a constitutionally protected liberty interest. *Cruzan*, 497 U.S. at 279, 110 S.Ct. at 2851; *Baer* 128 Md. App. at 481. Furthermore, these "interests" are not "run-of-the-mill" civil disputes and require careful protection. *Cruzan*, 497 U.S. at 283, 110 S.Ct. at 2854; *see Mack v. Mack*, 329 Md. 188, 207 (1993).

Of course, Ms. Berg and her so-called "experts" might see Mr. Foley's refusal of additional, invasive Lyme testing, on his wife's behalf, as folly. Nevertheless, Mrs. Foley's right goes so far as to allow her, or her agent, the right to make even foolish decisions regarding her medical treatment. "The very foundation of the doctrine . . . is

everyone's right to forego treatment or even cure if it entails what for [her] are intolerable consequences . . ., however warped or perverted [her] sense of values may be in the eyes of the medical profession, or even of the community . . . . *Individual freedom . . . is guaranteed only if people are given the right to make choices that would generally be regarded as foolish ones.*" *Baer*, 128 Md. App. at 481 (citing *United States v. Charters,* 829 F.2d 479, 495 (4th Cir. 1987)) (emphasis added.)

There is no doubt that the right to refuse testing or treatment is a liberty interest protected by Fourteenth Amendment. *Mack*, 329 Md. at 211 (citing *Cruzan*, 497 U.S. at 278, 287, 304-05, 331.) In *Cruzan,* the United States Supreme Court emphasized that a liberty interest in self-determination under the Fourteenth Amendment gives rise to a constitutionally protected right. *Cruzan*, 497 U.S. at 281, 110 S.Ct. at 2853 (it cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in self-direction of medical care); *see Mack v. Mack,* 329 Md. 188, 211 (1993) (the United States Supreme Court's decision in *Cruzan* strongly implied that a liberty interest under the Fourteenth Amendment gives rise to a constitutionally protected right to control one's own medical care.)

Of course, this same right to "bodily integrity" might also be raised, albeit unsuccessfully, by other persons in appeals of discovery orders compelling examinations or tests. For example, the alleged father in a paternity action might raise his right to "bodily integrity" in an attempt to avoid DNA testing. While the putative father's argument may fail, the level of protection of the right to "bodily integrity" in Mrs. Foley's case far exceeds the level in ordinary discovery disputes.

In the instant case, Mrs. Foley, through her agent, seeks to control and limit *her own testing and treatment* for Lyme disease in an effort to determine the future of *her own life*. On the other hand, the taking of evidence in a paternity

action or other proceeding may momentarily violate "bodily integrity", but any implication of a liberty interest is oft outweighed by a legitimate and compelling state interests, *i.e.*, establish paternity, *etc.* Moreover, Mrs. Foley's right to self-determination of medical testing and treatment is "particularized and intense" and can only be overridden by an "overwhelming" state interest.[17] In this case, however, there simply are no state interests that outweigh Mrs. Foley's right, exercised by her Health Care Agent, to refrain from testing and treatment. Simply put, the order for exam or testing in this case directly affects and completely eviscerates Mrs. Foley's right to self-determination through her Health Care Agent. No state interest, overwhelming or otherwise, is advanced by denying Mrs. Foley's "particularized and intense" liberty interest.

It is also important to note, in the context of this constitutional analysis, that the liberty interest asserted by Mrs. Foley will be forever lost. Once the Lyme disease testing is endured, the right to resist the testing will be forever lost to Mrs. Foley. When the State seeks, not to merely infringe on a liberty interest, but to permanently deprive an individual of that interest, a heightened standard of review is applied. *In re Adoption/Guardianship No. 95195062*, 116 Md. App. 443, 454 (1997) (citing *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 1397 (1982)). Any drastic and permanent deprivation of a liberty interest requires more careful protection than a momentary deprivation.

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[17] *See Williams v. Wilzack,* 319 Md. 485, 498 (1990) ("The liberty interest of a non-institutionalized mental patient to refuse treatment . . . was of such importance that it could be overcome only by 'an overwhelming [s]tate interest.' ") (quoting *In re Roe,* 421 N.E.2d 40 (Mass. 1981)); *see also Cruzan*, 497 U.S. at 314, 110 S.Ct. at 2870 ("particularized and intense" interest) (Brennan, J., dissenting on other grounds.)

It should be clear, then, that Mrs. Foley's right to self-determination is an "intense" and fundamental liberty interest, carefully protected by both substantive and procedural due process, and not outweighed by any legitimate, compelling, or overwhelming state interest.

B. Mr. Foley Has The Right To Direct Mrs. Foley's Care And To Advance Her Liberty Interests.

Patients who are physically or mentally unable to exercise the right to refuse treatment, nevertheless still enjoy the right. *See Mack,* 329 Md. at 212; *see also* 73 Op. Att'y Gen. 162, 175-78 (1988). The General Assembly created a statutory scheme protecting Mrs. Foley's important right. The Act provides a hierarchy of persons that may exercise a patient's right to refuse treatment. Sitting atop that hierarchical list is a properly appointed Health Care Agent, like Mr. Foley. Specifically, a Health Care Agent has medical decision-making priority over any other individuals. *See* HG §5-602(b)(3). Next on the list, and *always subordinate* to the Health Care Agent, is any court-appointed guardian. *See* HG §5-605(a)(2). Mr. Foley, as the appointed Health Care Agent, has the right to protect his wife's fundamental right to self-determination. That right should remain unfettered by Ms. Berg's Petition, by the trial court's absurd "discovery" Order, or by this Court's Opinion.

C. Mr. Foley Should Not Have To Place His Liberty In Jeopardy In Order To Fulfill His Duty As Mrs. Foley's Health Care Agent.

At oral argument, some on the Court suggested that Mr. Foley could get his appeal by refusing to comply with the trial court's order, thereby subjecting himself to an appealable contempt order. *See* Md. Code Ann., Cts. & Jud. Proc. ("C&JP") §12-304 Clearly, this Court cannot, within

proper constitutional parameters, require Mr. Foley to place his liberty in jeopardy at a contempt hearing in order to have this Court review and protect his wife's clearly established liberty interests. Civil contempt proceedings involving incarceration are serious matters imposing the potential burden of imprisonment. *See Department of Soc. Serv. v. Stein*, 328 Md. 1, 17 n.10 (1992) (where an "innocent" person, like Mr. Foley, should not be compelled to risk contempt to get appellate review). The proper time for this Court to decide the constitutional issues precipitating from the trial court's order is *now*.

III. The Trial Court's Order And The Opinion Of This Court Violate A Fundamental Liberty Interest Sheltered By Substantive And Procedural Due Process Constitutional Protections.

A. The Trial Court's Order Violates A Fundamental Liberty Interest Protected By Substantive Due Process.

The guarantee of due process contains a substantive component that "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439 (1993) (emphasis in original).

The trial court's so-called "discovery" order trumped Mr. Foley's agency and his wife's liberty interest in self-determination without advancing any compelling state interest. Mrs. Foley's liberty interest, however, is protected by substantive due process and must not be violated by the trial court. Furthermore, this Court's decision to render the trial court's determination unappealable was, itself, a violation of Mrs. Foley's substantive due process rights. For

these reasons, the Opinion must be reconsidered and the appeal must be allowed to proceed on the merits.

B. The Trial Court's Order And The Opinion Of This Court Violate A Fundamental Liberty Interest Protected By Procedural Due Process.

1. The Foleys Enjoy Procedural Due Process Protections Applied With Flexibility To The Facts Of This Case.

The Fourteenth Amendment and the Maryland Declaration of Rights provide that the trial court and this Court shall not deprive a person of life, liberty, or property without due process of law. Among other things, the due process right affords a right to procedural due process. Mrs. Foley is entitled to a constitutionally required minimum of procedural safeguards in connection with a deprivation of life, liberty, or property by the State. *Daniels v. Williams,* 474 U.S. 327, 337, 106 S.Ct. 662 (1986) (Stevens, J. concurring). "Procedural due process imposes constraints on governmental decisions [that] deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause...." *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S.Ct. 893 (1976).

Procedural due process, however, is a flexible concept that "calls for such procedural protection as a particular situation may demand." *Wagner v. Wagner,* 109 Md. App. 1, 24, *cert. denied,* 343 Md. 334 (1996); *see In re Adoption/ Guardianship No. 6Z970003,* 127 Md. App. 33, 54 (1999), *overruled in part on other grounds, In re Adoption/Guardianship No. T97036005,* 358 Md. 1, 16 (2000). Put another way, "the concept of due process is not static--the process that is due may change according to the circumstances." *Miserandino v. Resort Prop., Inc.,* 345 Md. 43, 65, *cert. denied,* 522 U.S. 953, 118 S.Ct. 376.

The Court must weigh three factors when determining if procedural due process guarantees an appeal, in this case "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See Maryland v. Bo Peep Day Nursery*, 317 Md. 573, 596 (1989) (citing *Mathews*, 424 U.S. at 334-35, 96 S.Ct. at 903.) Under the circumstances presented in the instant matter, considering the three enumerated factors, procedural due process requires that the trial court's decision, affecting an important liberty interest, be subject to appellate review.

2. When A Fundamental Liberty Interest Is Affected By A Trial Court's Order, An Appeal Is Guaranteed By Procedural Due Process Protections.

It is conceded that there is no general, universally applicable, right to an appeal.[18] It is well-settled, however, that liberty interests may not be terminated by the State absent procedural safeguards that allow for "fundamental fairness". *See, e.g., Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208 (1972). In this case, because the "discovery" order implicates Mrs. Foley's important liberty interests,

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[18] Mr. Foley acknowledges that the right to an appeal is not an absolute right required by due process of law, nor is it automatically an inherent or inalienable right. *See Committee for Responsible Develop. v. Baltimore*, 137 Md. App. 60, 78 (2001); *see also Lindsey v. Normet,* 405 U.S. 56, 92 S.Ct. 862 (1972); *Brown v. State,* 237 Md. 492, 498-499 (1965). Nevertheless, when a fundamental right is concerned, a review of a trial court's action implicating that right is guaranteed.

procedural safeguards that allow for "fundamental fairness" include the right to seek review of the order by appropriate appellate tribunals. Procedural due process requires appellate review of the trial court's decision implicating Mrs. Foley's liberty interest in self-determination.

3. As A Rule, When The Trial Court Grants, Via A Discovery Order, The Same Relief That Is Sought In The Case-In-Chief, Procedural Due Process Mandates An Appeal Right.

In this case, because the trial court granted relief via a "discovery" order, that was the same relief sought in the case-in-chief, due process rights mandate an appeal. Procedural due process means that similarly situated persons are treated with fundamental fairness. In this case, had the trial court granted guardianship to Ms. Berg, thereby allowing her to order the desired testing, an appeal would certainly lie. Mr. Foley was, however, denied his appeal because the trial judge granted the same relief pursuant to a purported "discovery" motion. This would be plainly unfair under any circumstance, and becomes "fundamentally" unfair when it deprives Mrs. Foley of any avenue to protect her important liberty interest.

The absurdity of the trial court's "discovery" order is best exemplified by listing the other situations in which use of discovery rules, to obtain the same relief sought in the case-in-chief, would be plainly absurd. For example, a discovery order, in a civil action, compelling production of the same documents sought in a Public Information Act case would be ludicrous and unfair. Also, in an injunctive action seeking an order compelling answers to certain questions, it would be plainly silly and unfair to issue a discovery order compelling deposition answers to the same questions. In similar fashion, the "discovery" order in this case, overriding the decisions of a Health Care Agent in an action that has as its main purpose overriding the decisions of that same Health

Care Agent, is absurd. Unfortunately, this Court's "fundamentally unfair" Opinion left Mr. Foley without the right to appeal that absurdity.

This Court has allowed interlocutory appeals in the past, when a "discovery order . . . requiring disclosure of files which . . . by statute . . . [were] confidential . . .", because the order would frustrate the statute in the same way the current order frustrates the Act. *See Stein*, 328 Md. 1, 21 (1992) (citing *Ketulla v. Abood*, 686 P.2d 1197, 1200-01 (Alaska 1984) (allowing appeal of discovery order where relief not available from any other court); *Foor v. Huntington Nat. Bank*, 499 N.E.2d 197, 1300 (Ohio 1986) (allowing appeal from discovery order where substantial right affected and weighing harm of order against interest in judicial economy.)) Moreover, this Court has found that certain non-final orders amount to "injunctive" relief, appealable under C&JP 12-303(3)(i), where order had effect of restraining or compelling action. *See Commission on Medical Discipline v. Stillman*, 291 Md. 390, 398 (1981).

Finally, it is interesting to note that, under HG §5-602 and HG §5-605, a court-appointed guardian (what Ms. Berg aspires to become) will *never* take priority over the Health Care Agent. Therefore, even if Ms. Berg prevailed on the merits and the trial court appointed her as guardian, she could still not overrule Mr. Foley's health care decisions for his wife. Remarkably, the trial court granted Ms. Berg certain relief, via the discovery rules, that the trial court could never have granted to her in the action, *even if Ms. Berg had waited to prevail on the merits.* Yet, this Court's holding renders such an order unappealable. This anomaly alone should alert this Court to the procedural and constitutional infirmities in its Opinion.

IV. This Court Need Not Be Concerned About Creating An Automatic Right To An Appeal Of Every Discovery Order.

This Court expressed concern (*see* Opinion at 8) that a right to appeal in this case would render every discovery order appealable. The Court apparently worried that, if Mr. Foley prevailed, any litigant asserting a right to object to discovery will argue that the right to object will be forever lost after complying with a discovery order. The Court opined that any litigant, seeking to forestall a mental or physical examination, interrogatory answers, production of documents or admission of facts, will employ Mr. Foley's logic to appeal any disagreeable discovery order. Mr. Foley seeks to assure the Court that the "sky" will not fall as predicted, if the present matter is decided on constitutional grounds. Mainly, this is because the instant case is different from the situations feared by the Court - Mrs. Foley's constitutionally protected liberty interests are implicated, whereas in normal discovery disputes, there are no such implications.

Certainly, if Mrs. Foley's mental capacity was at issue in a case, she might be *appropriately* examined to determine her level of disability. Such is not the case here, because Mrs. Foley's capacity is not in dispute.[19] Instead, Ms. Berg filed the Petition to become guardian so that she, *inter alia*, can have Mrs. Foley tested for Lyme disease in a manner consistent with Ms. Berg's wishes. By bringing such a claim, Ms. Berg attempted to override Mr. Foley's designation as agent and implicated Mrs. Foley's fundamental rights. The "discovery" order in this case, unlike the typical discovery order, implicates such rights and must be decided under constitutional principles and, therefore, must be subject to appeal.

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[19] If Mrs. Foley's level of disability was truly in dispute, Ms. Berg should have brought a motion for examination under Rule 10-202(b).

Clearly, the typical discovery order does not implicate constitutional rights. When, however, such a right is affected, the order must be reviewed, *on appeal*, under constitutional standards. This just makes simple sense. Any government action, including a trial court's discovery order, must pass constitutional muster and should be immediately appealable, especially if it permanently deprives a liberty interest.

For example, interrogatories, requests for admission, or deposition questions might seek information that would incriminate a civil litigant or witness. Certainly, a trial court could not properly issue an order compelling such testimony without violating liberty interests protected by the Fifth Amendment to the Federal Constitution. Such interests apply, not only at trial, but at the discovery stage as well. *See Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973); *United States v. Kordel,* 397 U.S. 1, 7, 90 S.Ct. 763 (1970); *see also Gray v. State*, 368 Md. 529, 559 (2002); *Kramer v. Levitt*, 79 Md. App. 575, 588-89 (1989). Is there any doubt that such a discovery order, if rendered, would be immediately appealable on constitutional grounds? The discovery order in the instant matter should be similarly appealable because it impedes a liberty interest.

Under the Court's Opinion in this case, however, neither discovery order would be appealable. Such constitutionally victimized litigants would be required to wait for their appeal and be compelled to decide between (1) waiving their constitutional right by complying with the discovery order; or (2) refusing to comply, thereby subjecting themselves to contempt sanctions. Such is not constitutionally viable. Thus, Mr. Foley respectfully contends that the Opinion of this Court is flawed.

CONCLUSION

Mr. Foley requests that this Court reconsider its April 4, 2003 Opinion."

Supreme Court, U.S.
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No. 03-210

IN THE

Supreme Court of the United States

MICHAEL L. FOLEY,

Petitioner,

v.

EUGENIA BERG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION FOR RESPONDENT EUGENIA BERG

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QUESTIONS PRESENTED

Petitioner sets forth one issue for review: "Does the Federal Constitution provide, independent of any state or federal collateral order doctrine, a right to appeal an interlocutory order infringing upon a fundamental liberty interest?" Because this statement oversimplifies the issues and does not address jurisdictional obstacles, Respondent submits the following questions:

1. Did Petitioner preserve his question for review when he did not assert it until his petition for rehearing in the Court of Appeals of Maryland, which that court denied without comment?

2. Is Petitioner correct in equating a discovery order requiring simple, relatively non-invasive blood and urine tests and a physical exam, issued under Maryland's equivalent to Fed. R. Civ. P. 35, with the order requiring the administration of antipsychotic drugs at issue in *Sell v. United States*, __ U.S. __, 123 S. Ct. 2174 (2003)?

3. Does a discovery order requiring blood and urine tests and a physical exam of a party, pursuant to rules of civil procedure allowing such discovery, infringe upon a "fundamental liberty interest"?

4. Does Maryland's final judgment rule, which does not allow interlocutory appeals of discovery orders requiring physical or mental examinations, violate procedural due process?

5. Is a state appellate court decision denying an interlocutory appeal of a discovery order a final judgment or decree reviewable by this Court?

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Respondent Eugenia Berg respectfully requests that this Honorable Court deny the petition for a writ of certiorari by Michael L. Foley seeking review of a decision by the Court of Appeals of Maryland dismissing his appeal of an interlocutory discovery order entered by the Circuit Court for Anne Arundel County, Maryland.

RESPONSE TO STATEMENT OF THE CASE

Petitioner ignores the pertinent facts demonstrating that the order at issue is a routine discovery order requiring relatively non-invasive medical tests and examination.

Sophia Foley, the incapacitated person who is the subject of this petition, was born on September 21, 1939. She grew up and lived in Taylor, Michigan, an endemic area for Lyme disease, for 20 years, before moving to Maryland and marrying Petitioner. Mrs. Foley gave birth to a daughter in 1985, at age 46.

Mrs. Foley's symptoms apparently began in 1988 or shortly thereafter. The exact progression is not clear due to a lack of medical records from 1986-90. Nevertheless, she apparently became depressed and withdrawn in 1988 and abruptly began to change her activities in 1990. Shortly thereafter, she began to experience memory loss and confusion. By mid-1992, when she was only 53 years old and her daughter only six, she had developed obvious neurocognitive deficits such as confusion, poor memory, and child-like behavior.

A neurologist diagnosed dementia from early onset Alzheimer's disease. Experts for both parties and the Lyme Disease Foundation, which submitted an amicus brief in the

Court of Appeals of Maryland in support of the Respondent, concur that Alzheimer's disease is diagnosed by ruling out other possible causes. It cannot be definitively diagnosed until autopsy. According to the neurologist, age 53 is a very young age to suffer from dementia due to Alzheimer's.

On June 25, 1992, Mrs. Foley signed a Health Care Power of Attorney designating Mr. Foley as her agent responsible for her medical care and treatment. That agreement gave one direction for her care: "I wish to live and enjoy life as long as possible. However, I do not wish to receive medical treatment which will only postpone the moment of my death from an incurable and terminal condition or prolong an irreversible coma."

Mrs. Foley's condition continued to deteriorate thereafter. By the fall of 1993 or August 1994, she reportedly had become incompetent to make decisions regarding her medical care, although she could still take care of daily needs such as washing, dressing, eating, cooking food, and stating intentions. By 1997, however, she had become substantially incapacitated due to her dementia. She exhibited mental confusion and was unable to bathe and dress herself, prepare her meals, or care for herself or others. Nevertheless, Mrs. Foley is not entirely incapacitated. Medical records indicate that she eats with her fingers and sometimes responds to music by attempting to dance.

Lyme disease shares many symptoms of Alzheimer's disease, multiple sclerosis, and other diseases of the nervous and musculo-skeletal systems. It especially resembles syphilis, as both may lay dormant and asymptomatic within the central nervous system for many years.

Mrs. Foley has had numerous common symptoms of late-stage Lyme disease: dementia, severe arthritis, difficulty in swallowing due to impairment of the Vagus nerve in the neck, depression, and seizures. Moreover, the onset of her symptoms at ages 47-51 corresponds with the average onset of late-stage Lyme disease.

Alarmed over their sister's condition and the fact that she had not received any medical attention in the preceding two years, in 1997, Ms. Berg, an older sister of Mrs. Foley, and two other sisters petitioned the Circuit Court for Anne Arundel County, Maryland, to become co-guardians for Mrs. Foley. In response to their stated concerns about possible Lyme disease, Mr. Foley allowed blood tests for serological antibodies to Lyme disease: (1) an "ELISA" test that was described by her treating physician as "weak positive"; and (2) two "Western Blot" tests that were negative.

Because these tests only detect the presence of antibodies in blood, they are not accurate. The bacterium that causes Lyme disease does not like to reside in the bloodstream and instead invades the central nervous system, thus avoiding antibody formation. As a result, the ELISA and Western Blot antibody tests have extremely high false negative rates: it is undisputed that 30-35% of infected patients test negative. The FDA has therefore issued an advisory that ELISA/ Western Blot tests "may be easily misinterpreted" and should be used as a corroborative measure, *i.e.*, "only to support a clinical diagnosis of Lyme disease," not to exclude or establish an infection.

The petition did not, however, provide medical opinions challenging the decisions of Mr. Foley. As a result, the court dismissed the petition but indicated that the decision could

be revisited if such medical testimony were provided in the future. Ms. Berg was granted visitation rights at the adult day care facility that cared for Mrs. Foley during the day.

In April 2000, Ms. Berg visited the day care center and found that Mrs. Foley was not there. For the next two to three days, Ms. Berg telephoned the center and was told that Mrs. Foley was absent. Understandably concerned, she went to the Foleys' house, where she found no one home and the kitchen door open. She entered and found Mrs. Foley alone, awake, and sitting on a sofa in the living room. Upon investigation, she discovered that Mr. Foley had been leaving his wife alone and unattended all day, five days a week, sitting on a sofa in the empty house with the kitchen door left open, until Mrs. Foley's teenage daughter returned home from school in the late afternoon. This had gone on for days and undoubtedly would have persisted for weeks, as Mr. Foley's payments to the center had fallen in arrears even though Ms. Berg had previously sent Mr. Foley a check large enough to pay past debts and continue attendance at the center.

Faced with the prospect of her sister remaining home without appropriate care or supervision, and aware of new and more accurate tests for Lyme disease, Ms. Berg again petitioned the Circuit Court for Anne Arundel County for co-guardianship. Unlike the first petition, in this preceding Ms. Berg presented affidavits from three separate physicians who opined that Mrs. Foley had not received proper medical attention and treatment for her dementia and other medical conditions. They pointed out that she (1) had not received a medical examination in the past three years; (2) had not received a Pap smear, mammogram, or other medical examination appropriate for a woman of her age in many years; and (3) exhibited symptoms of Lyme disease. They

concluded that Mrs. Foley's physicians had breached the standard of care and that she urgently needed new medical treatment.

The physicians also recommended a new and definitive test for Lyme disease and related tick-borne diseases: polymerase chain reaction ("PCR") tests of a patient's blood or urine for the bacterium's DNA. Although this test has a low positive rate (only 5 to 20% of infected patients test positive), unlike the antibody tests, a positive result is 100% conclusive for active Lyme disease infection.

Because the new petition provided a medical opinion in support, the court denied a motion by Mr. Foley to dismiss the new petition. Nevertheless, to proceed on the petition, Ms. Berg needed additional information. Under the Maryland statutes and rules governing guardianship proceedings, a petition for guardianship must include certificates from two licensed physicians (or one physician and one psychologist) indicating that they have examined or evaluated the individual and setting forth their opinions as to the "cause, nature, extent, and probable duration of the disability[.]" Md. R. Civ. P. 10-202(a)(1); *see also* Md. Code Ann., Est. & Tr. §§ 13-705(c)(2) (i) & (ii). This rule is not waivable, even if the parties to the proceeding concur that the disabled person is not competent. *See In re Lee*, 132 Md. 696, 711-12, 754 A.2d 426, 436-38 (2000). Moreover, if the person having control of the disabled person refuses to permit medical examination of the disabled person and the disabled person may be at risk unless a guardian is appointed, the trial court must hold a hearing, and, if it finds that examinations are needed, appoint physicians to report upon the cause, nature, extent, and probable duration of the disability. Md. R. Civ. P. 10-202(b)(2).

Mr. Foley did not consent to an examination by Ms. Berg's experts. To meet her obligations under Md. R. Civ. P. 10-202, Ms. Berg followed Maryland procedure and moved for a medical examination and testing under Md. R. Civ P. 2-423, a civil discovery rule equivalent to Fed. R. Civ. P. 35. Thus, while Petitioner contends that the trial court's discovery order for a medical exam and tests was "remarkable," the order merely followed settled, mandatory procedures under Maryland law. The cause, nature, extent and probable duration of Mrs. Foley's disabilities were in dispute, and the court therefore was obliged to order the medical discovery to answer those questions.

After extensive briefing and a thorough hearing, the trial court granted Ms. Berg's motion in substantial part and issued a discovery order providing for minimal urine tests, a blood test, a physical exam, and a vision test. Tellingly, while Petitioner characterizes the discovery order as requiring "experimental" treatment, he does not discuss the order's terms. This is not inadvertent. The order in question was hardly extraordinary. It merely required a single physical examination of Mrs. Foley, a single blood specimen, collection of up to ten urine specimens over a ten-week period, and a single non-invasive "visual contrast" eye examination. While Mr. Foley objected to each of these procedures, the blood specimen was the only procedure that he opposed as invasive and traumatic, purportedly because Mrs. Foley would require sedation. The attorney appointed by the court to represent Mrs. Foley proffered that the day care center could collect the urine specimens without trauma or difficulty. Mr. Foley did not dispute that statement.

During this appeal, Petitioner demonstrated that his concern over the purported invasiveness of a blood test was

a hollow deception. Even as he waged a bitter and costly appeal to prevent a new blood test of Mrs. Foley for Lyme disease, he has ordered further blood specimens to be drawn from Mrs. Foley in order to, *inter alia*, repeat the same ELISA and Western blot serological tests for Lyme done in 1997. This test, conducted on a blood specimen collected in June 2001 while Mr. Foley's appeal was pending in the Court of Special Appeals of Maryland, and after Petitioner had already obtained a stay of the PCR blood test ordered by the trial court, utterly belies Petitioner's claims that blood tests would be invasive, intrusive, unnecessary, and unfairly burdensome to Mrs. Foley.

That Mr. Foley directed his own blood tests without also allowing for the court-ordered PCR blood test – a test that, unlike the serological tests, can definitively confirm the presence of active Lyme or other related tick-borne diseases – speaks volumes to the gamesmanship at play here. Surely, if blood was being drawn, and especially if it was being drawn *for a Lyme disease test*, a PCR test should have been arranged or an additional sample drawn at the same time to prevent any future traumatic "invasion" of Mrs. Foley. Instead, by taking the very step that he has consistently proclaimed is unnecessary and ill-advised – ordering a blood test for Lyme disease – Petitioner has waived any plausible claim that the discovery order for PCR tests is unnecessary and/or traumatic for Mrs. Foley. His actions confirm what has long been obvious: Petitioner's justification for opposing the order, his sworn statements that a second blood test for Lyme disease would needlessly inflict great trauma, is a figleaf for his intractable and arbitrary opposition to any intervention by Ms. Berg or the courts.

Finally, Petitioner does not suggest here, and has never argued below, that the procedures employed by the trial court violated due process. Nor could he. Mrs. Foley had an attorney appointed to represent her interests (the same attorney who represented her in 1997), and that attorney supported the request for additional Lyme testing, although she believed a physical examination unnecessary.[1] The trial testimony from the 1997 proceedings were incorporated into the record, and each side submitted affidavits from multiple experts. The trial court held two days of hearings with all parties represented by counsel. Mr. Foley was permitted to move for reconsideration and to submit new evidence. As Petitioner was given a full and fair opportunity to present all arguments and evidence, he cannot claim that those procedures were constitutionally deficient.

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1. The attorney did not alter this position until the end of the Maryland appellate proceedings. She did not participate in the proceedings in the Court of Special Appeals of Maryland. She similarly did not oppose Ms. Berg's petition for a writ of certiorari filed in the Court of Appeals of Maryland, and she did not file a brief on the merits in that court. Nevertheless, with no warning, she filed a "reply brief" in that court that abandoned her support for testing and instead argued that due to the impact of the litigation upon the Foley family, she believed that it would be best for all that the case end.

REASONS FOR DENYING THE PETITION

A. The Question Presented By The Petition Differs Materially From The Issue Decided By The Lower Courts And Was Not Raised Until A Belated Post-Decision Motion For Reconsideration.

The specific issue presented by Petitioner here – "Does an Independent Constitutional Right Provide for an Interlocutory Appeal Protecting Fundamental Liberty Interests?" (Pet. at 10) – was not timely presented to the state courts. Instead, Petitioner first raised this issue in his motion for reconsideration filed *after* the Court of Appeals dismissed his appeal. Under this Court's settled precedents, this belated effort to concoct a constitutional issue comes too late to preserve the issue for review by this Court.

Petitioner had ample notice and opportunity to raise his constitutional challenge to Maryland's final judgment rule. In the intermediate appellate court, he filed a fourteen-page motion for a stay, much of which argued that the discovery order "meets all of the requirements of the collateral order exception to the final judgment rule." (Mot. to Stay Order of Disc. at 2). *See also id.* at 8-14. He never contended that the Maryland final judgment rule was unconstitutional as applied to this case.

Thereafter, Ms. Berg moved to dismiss his interlocutory appeal as impermissible under state law, and Petitioner opposed the challenge to appealability by relying upon his pending Motion to Stay Order of Discovery, not by raising a new constitutional issue. *See* Resp. to Mot. to Dism. App. at 1-2.

In the Court of Appeals, this failure to raise the issue was even more pronounced. Ms. Berg's petition for a writ of certiorari asserted lack of appellate jurisdiction as the first issue for review by that court. Petitioner's lone sentence in response merely recited to the decision of the Court of Special Appeals below: "It is Mr. Foley's opinion that the reasoning of the Court of Special Appeals as to why this appeal fits into this [collateral order] exception requires no further explanation or support." (Resp. to Pet. for a Writ of Cert. at 2). Even worse, despite the fact that the Court of Appeals granted review of all issues raised by Ms. Berg's petition, and that Ms. Berg again devoted a substantial portion of her brief to that issue, Mr. Foley's brief on the merits simply stated that he "need not address this issue again, and elects to submit upon the wisdom of the Court of Special Appeals on this issue." (Br. of Resp. at 44). Thus, despite ample notice of his peril, Petitioner left an open field for the Court of Appeals to apply its settled rule against interlocutory appeals of discovery orders.

Petitioner's attempt to demonstrate sufficient preservation of his constitutional challenge to the Maryland final judgment rule, *see* Pet. at 5-7, is highly misleading. Each of those arguments in the courts below discussed his contention that the *discovery order* implicated substantive due process rights of Mrs. Foley (*i.e.*, "constitutionally protected liberty interests"), *see id.*, not that denial of a right to appeal under the final judgment rule could violate procedural due process. That issue was never raised until his motion for reconsideration, A48-65, which, as this Court has repeatedly held, comes too late to establish a federal issue for review by this Court. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997) (per curiam) ("we have generally refused to consider issues raised clearly for the first time in a petition

for rehearing when the state court is silent on the question"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (where "Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," which "denied the petition without opinion," it "is well settled that this Court" will not grant review").[2]

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2. The decisions to this effect are legion. *See, e.g., Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring) ("[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below"); *Prudential Fed. Sav. and Loan Ass'n v. Flanigan*, 478 U.S. 1311, 1311 (1986) (Rehnquist, J.) ("claims presented by the applicants are not properly before" the Court where the "constitutional issues . . . were not properly presented . . . until the applicants filed for rehearing," which the state court "denied . . . without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation"); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958) (argument raised for first time in motion for rehearing was "not seasonably presented"); *Radio Station WOW, Inc. v. Johnson* 326 U.S. 120, 128 (1945) ("[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here"); *Herndon v. Georgia.*, 295 U.S. 441, 443 (1935) ("[t]he long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it"); *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 163 (1932) (petition for rehearing raising due process issue for first time "cannot serve as the basis for review by this Court"); *Citizens' Nat'l Bank of Cincinnati v. Durr*, 257 U.S. 99, 100 (1921) (petition for rehearing, denied without opinion, "must be regarded as having come too late to raise any question for review by this court"); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919) ("The settled rule is that [if] the essential federal question . . . [is] first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point"); *St. Louis & S.F.R. Co. v. Shepherd*, 240 U.S. 240,

(Cont'd)

Neither of the two exceptions to this rule applies here.

First, the Court of Appeals of Maryland did not issue an opinion deciding this issue. It is therefore presumed, as a matter of law, that the court did not rule upon it: When "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'" *Rotary Int'l*, 481 U.S. at 550 (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974)). Thus, boilerplate language by the state court that it "considered" the petition for rehearing (A37) does not suffice. *Consol. Tpk. Co.*, 228 U.S. at 333-34; *Forbes v. State Council*, 216 U.S. at 399.

(Cont'd)

241 (1916); *Bowe v. Scott*, 233 U.S. 658, 663 (1914) ("it is elementary that . . . a petition for rehearing affords no ground for invoking the jurisdiction of this court"); *Consol. Tpk. Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-34 (1913) ("Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing"); *Forbes v. State Council*, 216 U.S. 396, 399 (1910) ("[i]t has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late"); *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 311 (1903) (petition for rehearing "came too late"); *E. Bldg. & Loan Ass'n v. Welling*, 181 U.S. 47, 48 (1901) (same); *Pim v. City of St. Louis*, 165 U.S. 273, 274 (1897) (same); *Bushnell v. Crooke Min. & Smelting Co.*, 148 U.S. 682, 689 (1893) ("The attempt to raise for the first time a federal question in a petition for rehearing . . . is clearly too late").

Second, Petitioner cannot credibly claim surprise by the Court of Appeals' decision. He had ample opportunity to raise his purported constitutional right to interlocutory appeal in the lower courts. The decision did not reverse any precedents, nor did it present an unexpected interpretation of state law. Indeed, it went out of its way to point out that, under settled Maryland law, "the four requirements of the collateral order doctrine are very strictly applied," that "appeals under the doctrine may be entertained only in extraordinary circumstances," that such appeals are typically dismissed summarily, and that discovery orders are "consistently held" not to fall under the collateral order doctrine absent "a very few" extraordinary situations far from the "typical" discovery order at hand. (A6-9). The court cited eleven decisions that presaged its ruling. *Id.*[3]

Rule 10(c) limits certiorari to questions actually decided by the state court. The Petition fails to meet that standard.

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3. The Maryland appellate rules requiring parties to raise issues in their substantive briefs are also well established. The failure to do so generally is deemed a waiver. *See ACand S v. Asner*, 344 Md. 155, 189, 686 A.2d 250, 267 (1996) (denying motion for reconsideration because, *inter alia*, argument was never raised in brief). *See also Klauenberb v. State*, 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999); *Hyde v. State*, 228 Md. 209, 218, 179 A.2d 421, 425 (1962); *Comptroller of Treas. v. Aerial Prods., Inc.*, 210 Md. 627, 644, 124 A.2d 805, 814 (1956) (citing cases). Under Md. R. Civ. P. 8-605, Maryland appellate courts have broad discretion to deny a motion for reconsideration summarily, without deciding the issues raised therein. *See State v. Gross*, 134 Md. App. 528, 578 n.4, 760 A.2d 725, 751 n.4 (2000).

B. By Mischaracterizing The Discovery Order As Compelling "Treatment" Similar To *Sell v. United States*, Petitioner Distorts This Case.

Petitioner also distorts the substantive issue at hand. His Petition *presumes* that the discovery order infringes upon a fundamental liberty interest of Mrs. Foley, going so far as to proclaim that the Court of Appeals found as much. *See* Pet. at 8 (claiming that the "Court of Appeals of Maryland's decision determin[ed] that, despite permanent and irreparable deprivation of fundamental liberty interests," the discovery order was not appealable) (parenthesis deleted). The Court of Appeals made no such determination. To the contrary, the court concluded that the order for a medical examination was "a typical discovery order aimed at ascertaining critical facts upon which the outcome of the guardianship controversy might depend." (A8).

Indeed, in an effort to bootstrap this Court's recent decision in *Sell v. United States*, __ U.S. __, 123 S. Ct. 2174 (2003), Petitioner egregiously mischaracterizes the nature of the discovery order. He repeatedly describes it as requiring involuntary "medical testing and treatment," *see, e.g.*, Pet. at 10, even though the discovery order requires only a physical examination and minimal tests and ***no treatment*** whatsoever. (A13-15). *Sell*, by contrast, involved treatment but not tests, *i.e.*, forced administration of antipsychotic drugs to a mentally ill criminal defendant. This extreme measure is a far cry from the routine medical tests ordered below.[4]

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4. It is well-established that forced administration of antipsychotic medication implicates a "'significant'" constitutionally protected liberty interest. *See Sell*, __ U.S. at __, 123 S. Ct. at 2183 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)).

By conflating "treatment" with "tests," Petitioner has deliberately obscured the constitutional issues at hand. *Sell* is not applicable here, and, because the Petition rests entirely on *Sell*, it fails to demonstrate a constitutional deprivation.

C. Petitioner Ignores The Settled Rule Of Law Regarding The De Minimis Invasiveness Of Physical Examinations And Tests.

Petitioner mischaracterizes the discovery order for an obvious reason: this Court has consistently rejected claims that court-ordered blood or urine tests and physical examinations infringe fundamental liberty interests.

The Court made this point clear when it affirmed the constitutionality of Fed. R. Civ. P. 35 in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Plaintiff in that case challenged a court-ordered medical examination as infringing important and substantial rights of liberty and privacy, contrary to the Rules Enabling Act's prohibition against rules of civil procedure that abridge, enlarge, or modify any substantial right. The Court rejected that position, holding that "[t]he asserted right" of privacy against court-ordered physical and mental examinations is "no more important than many others" abridged by the Federal Rules of Civil Procedure. 312 U.S. at 14. The rule therefore did not infringe "important and substantial rights theretofore recognized." *Id.* at 13. *See also id.* at 14 (only a finding of contempt for disobedience, not the examination, "offends the important right to freedom from invasion to the person").

Indeed, the Court warned of serious dangers that would result from upholding the plaintiff's claim of a fundamental right "of freedom from invasion of the person." It explained, "If we were to adopt the suggested criterion of the importance

of the alleged right we should invite endless litigation and confusion worse confounded." *Id.* This case bears out that prophesy: Petitioner has been able to delay vital court-ordered medical testing and examination for ***2½ years***, even though Maryland law requires expedited adjudication of guardianship petitions, *see* Md. Code Ann., Est. & Tr. § 13-705(f), and Mrs. Foley's health has continued to deteriorate. That this has occurred even as Mr. Foley has authorized the same "invasion" of Mrs. Foley that he opposes here (*i.e.*, the taking of blood specimens for medical tests, including tests for Lyme disease), vividly illustrates the sort of cynical litigation mischief predicted in *Sibbach*.

Two decades later, the Court reaffirmed the absence of any constitutional issue arising from Rule 35 in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). There, the Court concluded that defendants as well as plaintiffs were subject to discovery under Rule 35, even if they had not placed their medical condition in controversy. The Court affirmed that this rule did not abridge substantive rights: "We hold that Rule 35, as applied to either plaintiffs or defendants in an action, is free from constitutional difficulty and is within the scope of the Enabling Act." *Id.* at 114.

These decisions are definitive. As one commentator wrote nearly 50 years ago, "the argument that physical examinations are of themselves an infringement of personal liberty is an anachronism." Richard J. Barnet, *Compulsory Medical Examinations Under the Federal Rules*, 41 Va. L. Rev. 1059, 1063 (1955). That reality has not changed. This Court has repeatedly confirmed the de minimis nature of blood and urine tests when reasonably compelled to advance an important government interest. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 625 (1989) (reiterating relative

insignificance of blood tests as "'such tests are a commonplace in these days of periodic examinations'" and "'that for most people the procedure involves virtually no risk, trauma, or pain'") (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)); *id.* at 666 n.7 (collection of urine sample is not "a significant invasion of privacy" if collection process respects privacy); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658-60 (1995) (same); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) ("[t]he blood test procedure has become routine in our everyday life"); *see also Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (blood testing poses "slight" intrusion that is "not significant" compared to reasonable governmental interests).

This case is no different. Petitioner has ordered blood tests imposing the same "violation" of personal freedom as that allegedly caused by the discovery order. This exercise in hypocrisy belies any credible claim that the order infringes "fundamental" rights.

D. This Court Has Held Repeatedly That The Lack Of An Appeal Right Does Not Violate Due Process.

Petitioners' other assumption, that the denial of an interlocutory appeal may violate due process, is equally unfounded. This Court has consistently held that if a party receives a full and fair hearing in the court of first instance, due process does not require any appeal, let alone interlocutory review. *See, e.g., Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("as [has been] frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance"). As Justice Frankfurter put it, "the right to judgment from

more than one court is a matter of grace and not a necessary ingredient of justice." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).[5]

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5. Again, numerous cases so hold. *See Lindsey v. Normet*, 405 U.S. 56, 76 (1972) ("this Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review"); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955) ("a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); *Nat'l Union of Marine Cooks v. Arnold*, 348 U.S. 37, 43 (1954) (while right of appeal "is important and must be exercised without discrimination, such a review is not a requirement of due process"); *District of Columbia v. Clowans*, 300 U.S. 617, 627 (1937) ("Due process does not comprehend the right of appeal."); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926) ("the well-settled rule [is] that an appellate review is not essential to due process of law, but is a matter of grace"); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 287 (1912) (the "right of appeal is not essential to due process"); *Rogers v. Peck*, 199 U.S. 425, 435 (1905) ("the state has the right to determine for itself . . . the appellate tribunals, if any, to which such causes may be carried to review"); *Reetz v. Michigan*, 188 U.S. 505, 507 (1903) ("we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question"); *McCane v. Durston*, 153 U.S. 684, 686 (1894) ("review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law"); *Andrews v. Swartz*, 156 U.S. 272, 274 (1895) (same); *The Francis Wright*, 105 U.S. 381, 386 (1881) ("The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right.").

States therefore are free to permit or restrict rights of appeal however they see fit:

> "[Appellate review] is wholly within the discretion of the state to allow or not to allow such a review." "It is therefore clear that the right of appeal may be accorded by the state to the accused upon such terms as, in its wisdom, may be proper;" and "whether an appeal should be allowed, and, if so, under what circumstances or on what conditions, are matters for each state to decide."

Andrews v. Swartz, 156 U.S. 272, 274 (1895) (quoting *McCane v. Durston*, 153 U.S. 684, 687 (1894)). This is true even in capital cases. *See id.*; *Rogers v. Peck*, 199 U.S. 425, 435 (1905); *Kohl v. Lehlback*, 160 U.S. 293, 297-99 (1895). In at least two states (Virginia and West Virginia) appeals remain discretionary, notwithstanding Petitioner's asserted constitutional right.

This black-letter principle is dispositive. Petitioner does not, and cannot, suggest that he was denied due process in the trial court proceedings. He does not contend that more than 100 years of this Court's jurisprudence regarding the lack of a constitutional right of appeal of final judgments was in error. Thus, the Petition implicitly devolves to the absurd proposition that a constitutional right of appeal adheres to interlocutory collateral orders but not to final judgments.

Instead of accounting for this settled and dispositive case law, Petitioner asserts that *Sell* signaled a sea-change in the rights of interlocutory appeal. *Sell*, according to Petitioner, did not just rest upon the collateral order doctrine but also

upon some implied constitutional principle that is sufficient, in and of itself, to establish a right of interlocutory appeal if constitutional issues are raised. *See* Pet. at 13-15. This argument is utterly meritless.

Sell neither stated nor implied any new constitutional principle regarding rights of appeal. Rather, it merely found that the order compelling administration of antipsychotic medication satisfied the collateral order doctrine as set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See Sell*, __ U.S. at __, 123 S. Ct. at 2182 ("this District Court order does appear to fall within the 'collateral order' exception" to the final judgment rule). And the collateral order doctrine itself is nothing more than a "practical rather than a technical construction" of the statutory requirement for final judgments for appeals brought under 28 U.S.C. § 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Otherwise, had *Sell* intended a new constitutional right of appeal for interlocutory orders affecting alleged constitutional rights, it would not have analyzed whether the important issue was "'completely separate from the merits of the action,'" a pivotal element of the collateral order doctrine that is missing here. *Compare Sell*, __ U.S. __, 123 S. Ct. at 2182 (quoting *Coopers*, 437 U.S. at 468) *with* A8 (explaining why discovery order was intertwined with merits).

Admitting that *Sell* is "murky" on the issue – a euphemism for utterly silent – Petitioner tries to find support from a few cases that he contends are "at odds" with the Court of Appeals of Maryland's decision. *See* Pet. at 8. These cases do nothing of the sort, as each simply relied on the collateral order doctrine or unique features of state law, and none involved discovery orders. *In re Master Key Antitrust*

Litig., 528 F.2d 5, 11 (2d Cir. 1975), dismissed an interlocutory appeal of an antitrust class action as failing to satisfy the collateral order doctrine; the only "constitutional" issue concerned a due process challenge to a consolidation order. *In re Brittany S.*, 147 N.H. 489, 490, 792 A.2d 384, 385 (2002), merely invoked a state supreme court rule giving it discretion to hear interlocutory appeals. And in *Commonwealth v. $9,847.00 U.S. Currency*, 550 Pa. 192, 196, 704 A.2d 612, 614 (1997), *reversing id.* 161 Pa. Com. 548, 637 A.2d 736 (1994), the Pennsylvania Supreme Court ***rejected*** the decision of the intermediate court, relied upon by Petitioner here, that the appeal could proceed under the collateral order doctrine, and instead reversed the intermediate court under a statute giving it discretion to hear extraordinary cases.

Petitioner also fails to account for cases such as *Bowles v. Comm'l Cas. Ins. Co.*, 107 F.2d 169, 170 (4th Cir. 1939) and *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992), which have denied interlocutory appeals of examinations ordered under Rule 35. Those cases, along with the many decisions rejecting interlocutory appeals of orders denying the privilege against self-incrimination, the attorney-client privilege, and other vital rights, confirm the lack of a constitutional issue here.

Finally, Petitioner's claimed constitutional right simply is not tenable as a practical matter and thus fails the *Matthews v. Eldridge* three-part test for procedural due process. *See Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (due process rights depend, in part, on fiscal and administrative burdens posed by additional requirements). If any order alleged to infringe constitutional rights were automatically appealable on an interlocutory basis, the impact on trial courts

would be extreme. Blood tests ordered in paternity cases, mental examinations in custody cases, property inspections or access ordered in real estate or environmental contamination cases, and testimony by deponents or witnesses claiming Fifth Amendment privilege against self-incrimination all could be subject to interlocutory appeals. As the 2½-year delay in this case attests, such a rule would wreak procedural havoc on trial courts.

E. The State Court Decision Is Not Final.

Finally, this Court lacks jurisdiction under 28 U.S.C. § 1257(a), as the appeal is interlocutory and not an appeal from a final judgment or decree of the highest state court. Although the decision of the Court of Appeals of Maryland is final as to the application of the Maryland collateral order doctrine, it neither decides Petitioner's constitutional challenge based upon *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990), nor satisfies the federal collateral order doctrine under 28 U.S.C. § 1291. Both grounds preclude review here.

First, state court judgments are not final if further proceedings might address federal issues. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam) (possibility of "piecemeal review with respect to [additional] federal issues" renders state court ruling non-final irrespective of whether case satisfies exceptions to final judgment rule); *Radio Station WOW*, 326 U.S. at 127 ("where the remaining litigation may raise other federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews").

Second, discovery orders are not final under the federal collateral order doctrine unless the party is held in contempt. *See Cunningham v. Hamilton County*, 527 U.S. 198, 208-09 (1999) (only contempt citation renders discovery sanction appealable final order).[6] If the order is not final under 28 U.S.C. § 1291(a), it is not final under § 1257(a).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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6. *Accord, United States v. Philip Morris Inc.*, 314 F.3d 612, 619 (D.C. Cir. 2003) (order to disclose allegedly privileged materials deemed final because civil contempt is not immediately appealable in D.C. Circuit); *FDIC v. Ogden Corp.*, 202 F.3d 454, 548 n.2 (1st Cir. 2000) (discovery order not final until contempt); *Connaught Labs., Inc. v. SmithKline Beecham P.L.C.*, 165 F.3d 1368, 1370 (Fed. Cir. 1999) (order not final where review could be obtained *after* contempt citation). *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121-22 (4th Cir. 1994); *Reise*, 957 F.2d at 295 ("A party aggrieved by the order assures eventual review by refusing to comply.").